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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THE STATE OF ARIZONA, Appellee, v. VICTOR LORETO, Appellant.	2 CA-CR 2011-0362 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201100396

Honorable Ann R. Littrell, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Victor Loreto was convicted of numerous charges involving the possession of drugs and weapons. He was sentenced to a combination of consecutive and concurrent sentences totaling twenty-four years followed by concurrent terms of probation. On appeal, he argues the trial court erred by denying his motion to continue trial, refusing his request to change counsel, and permitting him to waive counsel and represent himself. He also argues the consecutive sentence he received is illegal and requires resentencing. We affirm the convictions but remand for resentencing for the reasons set forth below.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the verdicts. *See State v. Wassenaar*, 215 Ariz. 565, ¶ 2, 161 P.3d 608, 612 (App. 2007). In May 2011, law enforcement officers executed a search warrant for Loreto's residence and found various firearms, illegal drugs, and drug paraphernalia. Loreto has a prior felony record. In interviews following his arrest, he admitted owning the firearms discovered in his residence, using various drugs, and selling marijuana and methamphetamine. An indictment filed that month charged Loreto with nineteen felony offenses. At his arraignment in early June, he was represented by deputy legal defender Richard Swartz, and a trial date was set for October 3, 2011. The state filed a supervening indictment on September 1, 2011, charging Loreto with an additional nine counts, for a total of twenty-eight felony offenses, stemming from the same seizure of Loreto's weapons, drugs, and drug paraphernalia.

¶3 In early September, Swartz filed a motion for a voluntariness hearing along with a "notice of trial conflict," advising the court that he was scheduled to represent a client being held in custody at a trial scheduled to begin the day after the trial in this case. In mid-September, Swartz filed a motion to continue Loreto's trial based on the same scheduling conflict. At the later arraignment on the supervening indictment, Loreto was represented by a different "coverage attorney" from the legal defender's office, and a different judge confirmed the October 3 trial date without mentioning the pending motion.

¶4 The trial court then heard argument on Loreto's motion to continue at a hearing on the last day of September. Loreto, who was out of custody, was not present at the hearing and waived his presence through counsel. During argument on the motion, Swartz explained that a trial conflict no longer existed, as his other trial had been rescheduled on the state's motion, but he had not prepared adequately for trial in this case due to his admittedly "foolish" assumption that a continuance would be granted.

¶5 The state objected to a continuance. It argued a delay was unwarranted because the trial was expected to last two or three days and would involve only seven witnesses for the state, all of whom worked in law enforcement or other government offices. It further maintained that Loreto's charges were relatively straightforward and that all were based on the same evidence that previously had been disclosed. In addition, the preparations Swartz sought to make—namely, interviewing witnesses—could be accomplished within the preexisting schedule by arranging telephonic interviews that weekend. Swartz admitted he did not "foresee any real surprise" from the interviews and

acknowledged that, although he desired more time to investigate the case, he "highly doubt[ed]" any substantive issues would arise from such efforts. After an extended discussion with both parties, the trial court denied the motion to continue, and the state made assurances it would expedite the interview process.

¶6 On the morning of the trial, Swartz avowed he was prepared to try the case. Loreto, however, complained that he felt "misrepresented" because he had been led to believe the trial would be continued. On this basis, he stated he "would like to change lawyers." The trial court denied the request. Loreto then alleged Swartz had not kept in contact with him, Swartz had not advised Loreto of "a lot of things that [he] wanted to know," and Swartz had provided "no disclosure" to Loreto. Loreto also indicated he had wanted to present testimony from three family members whom Swartz had failed to disclose as potential witnesses.

¶7 In response, Swartz asserted "Loreto ha[d] received every disclosure provided by the State" on the same day it had been disclosed. Regarding the potential witnesses, Swartz questioned the veracity of one family member and believed the other two family members would not provide any relevant material. Swartz acknowledged he had told Loreto the motion to continue probably would have been granted, given the circumstances at the time, but he denied ever telling his client the trial had been continued. Swartz also indicated that Loreto's dissatisfaction with his representation was not necessarily based on recent developments, observing, "[T]his conversation has happened in the past." Loreto essentially agreed, informing the trial court, "I told [Swartz] to resign off my case a while back. I don't know why he motioned." The

prosecutor also avowed that phone calls it had received from a private attorney around the time of the indictments indicated "there have been attempts by . . . Loreto to at least solicit representation from other attorneys in the past."

¶8 Upon further questioning from the trial court, Loreto acknowledged he had been advised of the charges and consequences he was facing if convicted, and he did not specify any other alleged deficiencies in Swartz's representation or communications. Loreto summarized as follows: "[T]here were certain things . . . in this case that don't make sense, you know[?] . . . It seems like everybody's against me, and that's how I feel." He added that he felt "fooled" and "trapped" by the lack of a continuance. The court explained its ruling denying the motion to continue and refused to reconsider its denial of the request to change counsel.

¶9 After the trial court had refused to substitute counsel, Loreto informed the court he wished to represent himself. Swartz and the prosecutor both stated for the record that they believed this was a poor decision. The court agreed, and it held a lengthy discussion with Loreto about the risks of self-representation. That discussion included repeated warnings to Loreto that he would be held to the same standards as an attorney and would not be granted a continuance if he chose to represent himself. Despite the warnings, Loreto stated at least nine times that he wished to represent himself. The trial court found Loreto competent to do so and granted the request, ordering Swartz to serve as advisory counsel.

¶10 Loreto represented himself at the ensuing pretrial voluntariness hearing and through the first day of trial, which consisted of jury selection. The next day, Loreto

began giving an opening statement, the state objected, and Loreto asked to be represented by Swartz once again. The trial court then reappointed Swartz, who served as counsel for the remainder of the trial. Three counts of the indictment were dismissed without prejudice before trial. The jury subsequently acquitted Loreto on three counts and found him guilty on the remaining twenty-two charges. This timely appeal followed the entry of judgment and sentence.

Procedural Issues

Continuance

¶11 Loreto first argues the trial court erred by denying his motion to continue. Such a motion must be made in writing and include specific reasons justifying the continuance. Ariz. R. Crim. P. 8.5(a). "A continuance of any trial date shall be granted only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice." Ariz. R. Crim. P. 8.5(b). "[T]he granting of a continuance is not a matter of right, but is left to the sound discretion of the trial judge." *State v. Sullivan*, 130 Ariz. 213, 215, 635 P.2d 501, 503 (1981). We will not disturb a court's ruling absent a clear abuse of discretion and resulting prejudice. *Id.*

¶12 Here, Loreto does not squarely argue that the trial court erred by denying Swartz's written motion to continue the trial. Loreto does, however, complain that counsel "was not ready for trial," and he suggests a continuance was necessary for Loreto "to be represented by competent counsel." We therefore find it appropriate to reach the issue.

¶13 A trial court has considerable discretion when ruling on a motion to continue a trial "because [the court] is the only unbiased party to an action in a position to observe the proceeding with an unjaundiced eye," and its unique perspective allows it to "observe whether any actual or supposed prejudice exists which would necessitate a continuance." *State v. Jackson*, 112 Ariz. 149, 154, 539 P.2d 906, 911 (1975). In some cases, allowing counsel to prepare for trial over the preceding weekend is insufficient to ensure a defendant receives effective representation. *See, e.g.*, *State v. McWilliams*, 103 Ariz. 500, 502, 446 P.2d 229, 231 (1968) (finding prejudice when attorney notified of trial one week beforehand and provided with essential materials only days in advance). Here, however, given counsel's months-long involvement in the case and his familiarity with the evidence and issues that would be presented at trial, the court did not abuse its discretion in determining a continuance was unnecessary for Swartz to be prepared and for justice to be served.

¶14 Loreto also states in passing that "[i]f the Court had granted [his] request for a continuance, he would have had time to hire a new attorney." To the extent Loreto claims the trial court's ruling denied his right to private counsel of his choosing, this argument is insufficiently developed in his opening brief and consequently waived. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995). And even if the argument were not waived, we would reject it on its merits.

¶15 A trial court has wide latitude in weighing a defendant's right to choose his own attorney against competing considerations of fairness and judicial economy. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006). To determine whether the denial of

a motion to continue violates a defendant's right to select and retain counsel, we look to the circumstances of the case, including

> whether other continuances were granted; whether the defendant had other competent counsel prepared to try the case; the convenience or inconvenience to the litigants, counsel, witnesses, and the court; the length of the requested delay; the complexity of the case; and whether the requested delay was for legitimate reasons or was merely dilatory.

State v. Hein, 138 Ariz. 360, 369, 674 P.2d 1358, 1367 (1983).

¶16 Here, the trial court noted that the trial date had been set for several months; Loreto's oral request for a continuance on the morning of trial therefore was untimely. In addition, Loreto's request for "some more time to get another lawyer" failed to specify the amount of time needed. Swartz was an experienced defense attorney who was familiar with the case and avowed he was prepared to try it, which the record corroborates. Despite the number of charges, the case was relatively straightforward, and the court suggested the evidence against Loreto, including his admissions to law enforcement officers, made it highly unlikely a different attorney would achieve a more favorable result. *See State v. Miller*, 111 Ariz. 321, 323, 529 P.2d 220, 222 (1974) (overwhelming evidence of guilt may be considered when determining whether denial of continuance violated right to counsel of choice).

¶17 Furthermore, Loreto's own remarks to the trial court established that his dissatisfaction with appointed counsel was longstanding, and some of the reasons he offered for the continuance were simply personal—wanting "family support" and feeling "not ready for a jury," for instance—or demonstrably false, which would allow an

inference that Loreto's request was merely a dilatory tactic. *Cf. State v. Ortiz*, 117 Ariz. 264, 266, 571 P.2d 1060, 1062 (App. 1977) (affirming denial of continuance where defendant alleged feeling "ill and unprepared to stand trial"). Considering all these factors, we cannot conclude the court abused its discretion by denying Loreto additional time to attempt to retain a private attorney.

¶18 Loreto further argues he was entitled to a continuance so he could prepare to represent himself. "Although a defendant enjoys a constitutional right to represent himself, the Constitution does not also require that a trial court grant a defendant a continuance regardless of the circumstances." *State v. Lamar*, 205 Ariz. 431, ¶ 26, 72 P.3d 831, 836 (2003). A court must grant an unequivocal motion to proceed pro se that is made before a jury is empanelled. *See id.* ¶ 22 & n.6; *State v. Ring*, 204 Ariz. 534, ¶ 46, 65 P.3d 915, 933 (2003). Yet a court retains discretion to deny a motion to continue made in conjunction with a motion to proceed pro se, *Lamar*, 205 Ariz. 431, ¶ 26, 72 P.3d at 836, and it may base its decision on a number of considerations, including "the trial court's prerogative to control its own docket." *Id.* ¶ 27.

> [W]hen a defendant asserts his right to self-representation and the trial court is prepared to grant the defendant's motion to proceed pro se but not his request for a continuance, "only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates" the defendant's constitutional right to self-representation.

Id., quoting Morris v. Slappy, 461 U.S. 1, 11-12 (1983).

¶19 Here, Loreto's own last-minute request for a delay was not justifiable, and the trial court's refusal to grant a continuance was not arbitrary. Much like his argument

below, Loreto's argument on appeal is based on the false premise that his appointed attorney was unprepared to try the case, making Loreto feel "forced to take up his own defense."[1] "The explanation a defendant provides to the trial court to justify a request for a continuance constitutes a critical factor in determining whether the trial court abused its discretion in denying the request." *Lamar*, 205 Ariz. 431, ¶ 31, 72 P.3d at 837. The court here did not abuse its discretion by denying a continuance based on Loreto's purported surprise at the reaffirmed trial date and his lack of confidence in his attorney. In sum, the court was not required to reschedule the trial simply to meet Loreto's prior expectations or to accommodate his subjective beliefs that counsel was unsatisfactory and that everyone was against him.

Change of Counsel

¶20 Loreto next challenges the trial court's denial of his request to substitute counsel. Although an indigent criminal defendant has a right to counsel, "[a] defendant is not . . . entitled to counsel of choice, or to a meaningful relationship with his or her attorney." *State v. Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d 578, 580 (1998); *accord Gonzalez-Lopez*, 548 U.S. at 151 ("[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them."). A defendant is entitled to a change in court-appointed counsel only if he establishes an irreconcilable conflict or a total breakdown in communication with his attorney. *State v. Torres*, 208 Ariz. 340, ¶¶ 6,

[1]Although tactical decisions sometimes raise questions about attorney competence, *State v. Henry*, 189 Ariz. 542, 547, 944 P.2d 57, 62 (1997), whether counsel provided effective assistance is an issue that must be resolved exclusively through the post-conviction process set forth in Rule 32, Ariz. R. Crim. P. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

8, 93 P.3d 1056, 1058, 1059 (2004). When a defendant asks for new counsel to be appointed, the court must inquire into the grounds for substitution. *Id.* ¶ 7. The nature of a defendant's request determines what level of inquiry is required. *Id.* ¶ 8. At minimum, the court must inquire into the basis for the defendant's request on the record. *Id.* ¶¶ 7-8.

¶21 Personality conflicts and disputes over trial strategy are not irreconcilable conflicts and do not require a formal evidentiary hearing. *See State v. Cromwell*, 211 Ariz. 181, ¶ 30, 119 P.3d 448, 454 (2005). If an alleged conflict is less than irreconcilable, a court need only consider it as one factor among several when determining whether substitution is appropriate. *Id.* ¶ 29. Those factors include "whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and [the] quality of counsel." *Id.* ¶ 31, *quoting State v. LaGrand*, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987). We review for an abuse of discretion a trial court's denial of a request to substitute counsel. *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 8, 154 P.3d 1046, 1050 (App. 2007).

¶22 Here, as noted above, the trial court found Loreto's request to substitute counsel untimely because he had ample time before trial to request a different attorney. Loreto's specific criticisms of Swartz's performance also largely concerned disputes over defense strategy, not the quality of his representation. On appeal, Loreto emphasizes that he "did not trust Mr. Swartz" and believed him to be a "liar." Yet this amounts to a personality conflict, not an irreconcilable one. *See id.* ¶ 14 (loss of trust not sufficient

cause for substitution). Loreto further complains of a lack of communication with counsel, particularly as it concerns the motion to continue, but the record clearly shows that meaningful communication with counsel had taken place, even if Loreto was dissatisfied with it. Because the alleged conflicts with counsel were not irreconcilable, the court appropriately considered all the relevant factors when weighing Loreto's rights against the public interest in judicial economy, *see Cromwell*, 211 Ariz. 181, ¶ 31, 119 P.3d at 454, and it did not abuse its discretion by denying his request.

Waiver of Counsel

¶23 Loreto also contends the trial court erred by permitting him to represent himself and finding he knowingly, voluntarily, and intelligently had waived his right to counsel. "The right to counsel under both the United States and Arizona Constitutions includes an accused's right to proceed without counsel and represent himself." *Lamar*, 205 Ariz. 431, ¶ 22, 72 P.3d at 835. "A defendant can affirmatively waive the right to counsel at trial, as long as the waiver is knowing, voluntary and intelligent." *State v. Hampton*, 208 Ariz. 241, ¶ 7, 92 P.3d 871, 873-74 (2004).[2] Whether a defendant has made an intelligent and knowing waiver of counsel is a question of fact that "is based substantially on the trial judge's observation of the defendant's appearance and actions." *State v. Dann*, 220 Ariz. 351, ¶ 10, 207 P.3d 604, 611 (2009). Accordingly, we review a court's determination for an abuse of discretion. *See id.* ¶ 25.

[2]A request to waive counsel and represent oneself also must be "unequivocal and timely." *Lamar*, 205 Ariz. 431, ¶ 22, 72 P.3d at 835-36. Here, neither of the parties disputes that Loreto's request was timely and unequivocal.

¶24 A valid waiver of counsel requires that a pro se litigant understand the nature of the charges against him, the possible consequences he faces if convicted, and the risks of self-representation. *Id.* ¶ 24. The issue is not whether the defendant made a wise decision, but whether he fully understood the consequences of his waiver. *See State v. Djerf*, 191 Ariz. 583, ¶ 25, 959 P.2d 1274, 1283 (1998); *State v. Harding*, 137 Ariz. 278, 287, 670 P.2d 383, 392 (1983). Indeed, "a defendant normally gives up more than he gains when he elects self-representation." *Adams v. Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989).

¶25 Here, Loreto recognizes the trial court "apprised [him] of the dangers of self-representation" but he complains the court somehow failed to "ensure that [he] made an informed decision." To ensure a knowing and intelligent waiver of the right to counsel, a trial court need only inform the defendant of the rights and privileges he will relinquish and the disadvantages of self-representation. *See Wassenaar*, 215 Ariz. 565, ¶ 22, 161 P.3d at 615. The court's inquiries and discussions with Loreto demonstrated he knew the charges against him, the consequences he faced if convicted, and the numerous problems he faced by proceeding on his own behalf. Ultimately, the court did more than was required to caution Loreto and urge him to reconsider, and the imprudence of his decision does not serve as evidence of a deficient warning or inquiry on the part of the court. The record fully supports the court's finding that Loreto knowingly and intelligently waived his right to counsel.

¶26 Loreto also suggests his waiver was involuntary. This argument is based on a false premise, which we already have disposed of above, that the trial court "forced

[him] into an untenable position [to] either accept the representation of an attorney that . . . the trial court . . . knew was not prepared for trial or represent himself." Counsel avowed he was prepared to try the case before trial began, the court accepted this avowal, and the record supports the court's determination on the matter. Because Loreto's relationship with counsel was neither completely fractured nor irreconcilable, the choices Loreto faced concerning his representation were constitutionally permissible, and his waiver of counsel therefore was voluntary. *See Moody*, 192 Ariz. 505, ¶ 22, 968 P.2d at 582. Some of Loreto's statements below complaining that he had "no choice" in the matter were appropriately disregarded by the court as attempts to renegotiate the denial of the request for a continuance. *Cf. State v. Henry*, 189 Ariz. 542, 547-48, 944 P.2d 57, 62-63 (1997) (rejecting self-representation assignment of error by defendant "dissatisf[ied] with his lawyers," arguing court had "erroneously denied his motion to continue").

¶27 Loreto further claims he was not competent to waive counsel under the standard set forth in *Indiana v. Edwards*, 554 U.S. 164 (2008). Relying on *State v. Cornell*, 179 Ariz. 314, 878 P.2d 1352 (1994), he thus argues the trial court failed to "initiate a hearing on [his] competence to waive counsel." Loreto's reliance on *Edwards* is misplaced. There, the United States Supreme Court held the constitution "permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." 544 U.S. at 178. Our own supreme court has emphasized that *Edwards* "does not give such a defendant a

constitutional right to have his request for self-representation denied." *State v. Gunches*, 225 Ariz. 22, ¶ 11, 234 P.3d 590, 593 (2010).

¶28 Even under *Edwards*'s heightened competency standard, however, the record does not suggest a competency hearing was required here because Loreto "was not a 'gray area' defendant 'unable to carry out the basic tasks needed to present his own defense without the help of counsel.'" *Gunches*, 225 Ariz. 22, ¶ 12, 234 P.3d at 593, *quoting Edwards*, 554 U.S. at 175-76. Loreto could understand the trial court's questions, respond appropriately to them, and formulate and present germane arguments. He also was provided with advisory counsel for added assistance. There was no issue of Loreto's sanity in this case; no mental health evaluations had been performed; and neither of the attorneys involved questioned Loreto's mental competence to represent himself. The prosecutor asked the court to make an express finding on the competence issue but did so, in part, because he believed Loreto had shown a willingness in prior cases to manipulate the justice system, and the prosecutor feared that Loreto's self-representation here might simply be an attempt to obtain a continuance or create a mistrial. In sum, no competency hearing was required because the record disclosed no "good faith doubt about [Loreto]'s 'ability to understand the nature and consequences of the waiver, or to participate intelligently in the proceedings and to make a reasoned choice among the alternatives presented.'" *Cornell*, 179 Ariz. at 322-23, 878 P.2d at 1360-61, *quoting Harding v. Lewis*, 834 F.2d 853, 856 (9th Cir. 1987).

¶29 As evidence of his incompetence, Loreto points to his "paranoid belief that everyone was against him" as well as the statements he made during the voluntariness

hearing, in which he denied remembering what he had said during his interview with investigators because he had been "really high on drugs" and "not coherent," with "[e]verything [being] cloudy to [him] that day." Most of these statements were self-serving. Moreover, upon further questioning from the trial court, Loreto insisted there was nothing "clouded" about his decision to represent himself, and he denied being under the influence of any drugs in court. The court thus accepted his repeated request to represent himself, and we find no abuse of discretion in its determination that he was competent to do so. *See Gunches*, 225 Ariz. 22, ¶ 12, 234 P.3d at 593.

Sentences

¶30 Last, Loreto argues the trial court erred by imposing a consecutive sentence for count eleven of his indictment. Count eleven alleged Loreto had committed misconduct involving weapons by possessing a "sawed-off shotgun," specifically a Remington twelve-gauge shotgun with a barrel less than eighteen inches long. *See* A.R.S. §§ 13-3101(A)(8)(a)(iv), 13-3102(A)(3).[3] The court imposed a twelve-year sentence on this count and ordered that it be served consecutively to the twelve-year sentence imposed for count two of the indictment. Count two alleged misconduct involving weapons based on Loreto being a prohibited possessor in possession of a .22 caliber handgun. *See* § 13-3102(A)(4). Except for count eleven, the court ordered all of Loreto's other sentences to be served concurrently with count two, for a total term of

[3]We cite the current version of these statutes because the relevant provisions have not changed since Loreto committed his offenses on May 10, 2011. *See* 2010 Ariz. Sess. Laws, ch. 59, § 2 (former § 13-3102); 2009 Ariz. Sess. Laws, ch. 145, § 2 (former § 13-3101).

twenty-four years' imprisonment.[4] In effect, this combination made count eleven consecutive to counts one and six, which respectively charged Loreto with possession of a firearm by a prohibited possessor, *see* § 13-3102(A)(4), and possession of a firearm during a felony drug offense, *see* § 13-3102(A)(8), all of which were based on his possession of the same sawed-off shotgun.

¶31 Loreto contends his sentence is illegal because the consecutive sentence violates A.R.S. § 13-116 and fails the test set forth in *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989). The state does not dispute this point and therefore has conceded the error. *See State v. Pena*, 209 Ariz. 503, ¶ 17, 104 P.3d 873, 877 (App. 2005). Indeed, the presentence report recommended concurrent sentences for counts one, six, and eleven because this was legally required. The prosecutor likewise stated at sentencing that the "sawed-off counts, there are three of them, have to run concurrent."

¶32 On appeal, the state contends fundamental error review applies to this issue because Loreto did not raise it before the trial court, and the state further maintains Loreto has not made the requisite showing of prejudice to obtain appellate relief. Assuming arguendo that the state has identified the proper standard of review and that *State v. Vermuele*, 226 Ariz. 399, 249 P.3d 1099 (App. 2011), does not apply, the illegal

[4]We need not address the probationary terms imposed, as these are irrelevant to our analysis.

sentence is fundamental error at any rate.[5] *State v. McPherson*, 228 Ariz. 557, ¶ 4, 269 P.3d 1181, 1183 (App. 2012) (illegal sentence is fundamental error).

¶33 The state suggests the error here is harmless and requests that this court simply modify Loreto's sentences on appeal. Relying on *State v. Ojeda*, 159 Ariz. 560, 769 P.2d 1006 (1989), the state reasons that because "the trial court clearly intended to impose a 24-year total sentence for the weapons counts," the appropriate remedy here is to make counts one, six, and eleven concurrent with each other but consecutive to the other sentences.

¶34 The state's reliance on *Ojeda* is misplaced. In that case, our supreme court acknowledged that when a trial court relies on erroneous factors when imposing a sentence or revoking probation, an appellate court "should affirm without remand only where the record clearly shows the trial court would have reached the same result even without consideration of the improper factors." *Id.* at 562, 769 P.2d at 1008. Because, contrary to the state's position, the record here does not clearly show what the court intended with respect to counts one, six, and eleven, *Ojeda* does not apply, and we decline to speculate on the matter.

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[5]The court's decision to order counts one and six to be served consecutively to count eleven was an unanticipated error that first arose during the pronouncement of sentence; thus, Loreto arguably had no obligation to object to preserve the issue for appeal under *Vermuele*, 226 Ariz. 399, ¶ 6, 249 P.3d at 1101. However, after pronouncement of sentence, the court did ask counsel if there were any other matters to address, and Loreto took the opportunity to suggest modifications to the sentence, which the court adopted. Given that the sentencing error Loreto has raised on appeal would be fundamental at any rate, we need not address whether a trial court's perfunctory invitation to address housekeeping matters is the equivalent of an invitation for counsel to challenge the sentence already pronounced.

¶35 "[A] trial court must choose, among concurrent and consecutive sentences, whichever mix best fits a defendant's crimes." *State v. Fillmore*, 187 Ariz. 174, 184, 927 P.2d 1303, 1313 (App. 1996). Because the record does not reveal how the trial court would have exercised its discretion and what sentences it would have imposed if it had known a consecutive sentence was not available only for count eleven, we vacate all of Loreto's sentences and remand for resentencing. *See State v. Viramontes*, 163 Ariz. 334, 340, 788 P.2d 67, 73 (1990).

Disposition

¶36 For the reasons stated, we affirm Loreto's convictions but remand for resentencing consistent with this decision.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.