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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THE STATE OF ARIZONA, Appellee, v. ROBERT CONRAD SAINZ, Appellant.	2 CA-CR 2011-0401 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103380001

Honorable Stephen C. Villarreal, Judge

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Robert Sainz was convicted of manslaughter, a dangerous-nature offense, and the trial court sentenced him to a partially aggravated prison term of eighteen years. On appeal, Sainz argues the sentence imposed was illegal because the state failed to give notice of its intent to allege aggravating factors before trial. He also contends the court abused its discretion by imposing a partially aggravated sentence. For the reasons stated below, we affirm.

Factual Background and Procedural History

¶2 We view the facts in the light most favorable to sustaining Sainz's conviction and sentence. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In August 2010, Sainz and M.M. drove from California to Tucson to help a mutual friend move and to collect M.M.'s belongings. During the drive, both men consumed alcohol and smoked marijuana. After arriving in Tucson and helping their friend, Sainz and M.M. drove to an apartment complex where M.M. planned to pick up his belongings. Upon arriving at the apartment complex, however, Sainz became "agitated" when M.M. was slow in exiting the vehicle, and a physical altercation ensued. The altercation continued from the car into the courtyard. During the struggle, Sainz stabbed M.M. fifteen times. Sainz received a single superficial cut to his arm. Leaving M.M. sitting hunched over on the ground, Sainz fled the scene in the car, which he later abandoned at a nearby drugstore. By the time police officers arrived, M.M. had died from the stab wounds.

¶3 Despite returning to California and altering his appearance, Sainz eventually was arrested and indicted for first-degree murder. The state also filed an

allegation that Sainz had a prior conviction for aggravated driving under the influence (DUI) while his license was suspended, revoked, or restricted and that it intended to use the conviction to enhance Sainz's sentence. Sainz admitted the prior conviction while testifying at trial. He was convicted of the lesser-included offense of manslaughter, which the jury found to be a dangerous-nature offense. At sentencing, the court found the prior conviction and the impact of M.M.'s death on his family to be aggravating factors. The court also found five mitigating factors, but concluded the aggravating factors outweighed the mitigating factors and imposed a partially aggravated prison term. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A).

Discussion

Pretrial Notice

¶4 Sainz argues that "because the state gave no notice of aggravating factors prior to trial, imposition of a partially aggravated sentence was illegal." Although Sainz suggests he raised this argument below in his sentencing memorandum, the record reflects Sainz's objection to the imposition of an aggravated sentence was based only upon the trial court having found additional aggravating factors beyond the prior conviction. Because Sainz failed to raise the notice argument in the trial court, we agree with the state that he has forfeited this issue absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Nevertheless, the

imposition of an illegal sentence constitutes such error.[1] *State v. Lewandowski*, 220 Ariz. 531, ¶ 4, 207 P.3d 784, 786 (App. 2009).

¶5 Contrary to Sainz's argument, aggravating factors need not be included in an indictment in either non-capital or capital cases. *State v. Aleman*, 210 Ariz. 232, n.7, 109 P.3d 571, 578 n.7 (App. 2005). Even in capital cases, a defendant is only entitled to sufficient notice of aggravating factors to "'have a reasonable opportunity to prepare a rebuttal.'" *State v. Scott*, 177 Ariz. 131, 141-42, 865 P.2d 792, 802-03 (1993), *quoting State v. Ortiz*, 131 Ariz. 195, 207, 639 P.2d 1020, 1032 (1981), *disapproved on other grounds by State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983). And this court has held in non-capital cases that notice of aggravating factors in the state's sentencing memorandum provides sufficient notice for due process purposes, *State v. Jenkins*, 193 Ariz. 115, ¶ 21, 970 P.2d 947, 953 (App. 1998), and that a trial court does not err by sua sponte finding aggravating factors based upon the record, *State v. Marquez*, 127 Ariz. 3, 5-6, 617 P.2d 787, 789-90 (App. 1980).

¶6 Sainz nevertheless claims that, in light of *Ring v. Arizona*, 536 U.S. 584 (2002), the state must provide pretrial notice of the aggravating factors upon which it

[1]The state also contends that Sainz "invited any error by informing the trial court that it could find his admitted prior felony conviction to be an aggravating factor." According to the invited error doctrine, "if the party complaining on appeal affirmatively and independently initiated the error, he [is] barred from raising the error on appeal." *State v. Lucero*, 223 Ariz. 129, ¶ 31, 220 P.3d 249, 255 (App. 2009). But if "he merely acquiesced in the error proposed by another, the appropriate sanction [is] to limit appellate review to fundamental error." *Id.* We believe this is a case of the latter. Both at trial and sentencing, upon questioning by the trial court, defense counsel agreed that Sainz's prior conviction could be considered as an aggravating factor. We thus review for fundamental error.

intends to rely. In *Ring*, the United States Supreme Court held that a defendant's Sixth Amendment right precludes a sentencing judge, sitting without a jury, from finding an aggravating factor necessary for imposition of the death penalty. 536 U.S. at 609. The decision effectively declared our capital sentencing scheme unconstitutional. But post-*Ring*, our supreme court has confirmed that "aggravators [need] not [be] specified in the indictment . . . because the defendant will have been given ample notice under the Arizona Rules of Criminal Procedure." *McKaney v. Foreman*, 209 Ariz. 268, ¶ 16, 100 P.3d 18, 21 (2004).[2]

¶7 Sainz points to Rule 13.5(a), Ariz. R. Crim. P., which applies to non-capital cases, and claims that it requires the state to give notice of all sentencing allegations—including aggravating factors—within the time limits of Rule 16.1(b), Ariz. R. Crim. P. But Sainz largely relies on cases involving notice requirements for sentencing enhancement rather than aggravating factors. *See, e.g.*, *State v. Waggoner*, 144 Ariz. 237, 238-39, 697 P.2d 320, 321-22 (1985) (allegation of release status); *State v. Guytan*, 192 Ariz. 514, ¶ 28, 968 P.2d 587, 595 (App. 1998) (allegation of gang motivation). These cases are inapplicable here. And, contrary to Sainz's assertion, *State ex rel. Smith v. Conn*, 209 Ariz. 195, ¶ 10, 98 P.3d 881, 884 (App. 2004), stands for the proposition that the state may add an allegation of aggravating factors to an indictment prior to trial, not that it must.

[2]In a capital case, the state must give the defendant notice of its intention to seek the death penalty, Ariz. R. Crim. P. 15.1(i)(1), and notice of the aggravating factors it intends to prove, Ariz. R. Crim. P. 15.1(i)(2). *See also McKaney*, 209 Ariz. 268, ¶ 15, 100 P.3d at 21. But the Arizona Rules of Criminal Procedure do not contain similar provisions for non-capital cases.

¶8 Read together, Rules 13.5(a) and 16.1(b) permit the state to amend an indictment to include "an allegation of one or more prior convictions or other non-capital sentencing allegations that must be found by a jury" at least twenty days before trial. However, neither the Sixth Amendment nor Arizona law requires a prior conviction to be "found by a jury." *See* A.R.S. § 13-701(C); *State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005). And when one aggravating factor has been established, the court may consider additional factors without presenting them to a jury. *See Martinez*, 210 Ariz. 578, ¶ 27, 115 P.3d at 625-26. Before trial, the state alleged Sainz had a prior conviction for purposes of sentence enhancement. Once the court found the prior conviction to be an aggravating circumstance, the other circumstances did not require a jury's determination. Thus, Rules 13.5(a) and 16.1(b) do not apply here.[3]

¶9 Even assuming a non-capital defendant is entitled to notice of aggravating factors, Sainz received sufficient notice. Sainz received notice of the state's intent to use his prior conviction to enhance his sentence more than one year before trial. His indictment also included a reference to § 13-701, which enumerates certain aggravating and mitigating factors.[4] At trial, the state made clear that it intended to use the prior conviction as an aggravator. And Sainz received further notice in the state's sentencing

[3]We likewise reject Sainz's suggestion that because a defendant may challenge sentencing allegations prior to trial, *see* Ariz. R. Crim. P. 13.5(d), he is entitled to receive notice of the alleged aggravating factors before trial. Rule 13.5(d) also applies to sentencing allegations that must be "found by a jury."

[4]Sainz asserts that "merely citing a statute that has 24 subsections provides no real notice to a defendant." But this claim lacks merit because notice of aggravating factors simply is not required in the indictment. *Aleman*, 210 Ariz. 232, n.7, 108 P.3d at 578 n.7.

memorandum regarding its intent to use both the prior conviction and the impact of M.M.'s death on his family as aggravating factors. We therefore find no error, let alone fundamental error, warranting a reversal of Sainz's sentence.

Partially Aggravated Sentence

¶10 Sainz next contends the trial court abused its discretion by imposing a partially aggravated sentence. More specifically, he claims the court erred by failing to find his remorse to be a mitigating factor; by aggravating his sentence based upon an implicit finding that the offense was especially heinous, cruel, or depraved; and by awarding a disproportionate weight to the aggravating factors. "A trial court has broad discretion in determining the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within the statutory limits . . . unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). We will find an abuse of discretion if the court acted arbitrarily or capriciously or failed to adequately investigate the facts relevant to sentencing.[5] *State v. Ward*, 200 Ariz. 387, ¶ 6, 26 P.3d 1158, 1160 (App. 2001).

¶11 Because Sainz was convicted of manslaughter, a dangerous-nature offense and class-two felony, he was subject to a minimum of seven and a maximum of twenty-

[5]The state urges us to review this argument for fundamental, prejudicial error because it was not raised before the trial court. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. However, in *State v. Vermuele*, 226 Ariz. 399, ¶ 6, 249 P.3d 1099, 1101 (App. 2011), this court held the defendant had not forfeited his sentencing error claims "[b]ecause a trial court's pronouncement of sentence is procedurally unique in its finality under our rules . . . and because a defendant has no appropriate opportunity to preserve any objection to errors arising during the court's imposition of sentence." Because the same principles apply here, we conclude this argument has not been forfeited and review for an abuse of discretion.

one years' imprisonment. *See* A.R.S. § 13-704(A). At sentencing, the trial court found Sainz's prior conviction and the impact of M.M.'s death on his family to be aggravating circumstances. The court also found the following mitigating circumstances: Sainz's physical and emotional abuse by his father; his family's support; his alcohol and drug abuse; his chaotic childhood; and his age. After concluding that the "aggravating circumstances outweigh[ed] the mitigating circumstances," the court imposed a partially aggravated eighteen-year prison term.

¶12 Sainz first claims the trial court erred in rejecting "[his] obvious and repeated demonstrations of remorse and acceptance of responsibility" as a mitigating circumstance. Section 13-701(E) sets forth the mitigating circumstances the court must consider in sentencing. The court is required to consider mitigating evidence, but it is not required to find that mitigating circumstances exist merely because such evidence is presented. *Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 357. If evidence is offered to establish a mitigating factor not specifically enumerated in § 13-701(E), the court need not even consider the evidence, although it has discretion to do so. *See* § 13-701(E)(6); *State v. Long*, 207 Ariz. 140, ¶ 41, 83 P.3d 618, 626 (App. 2004). Remorse is not enumerated in § 13-701(E). *See also State v. Dann*, 220 Ariz. 351, ¶ 150, 207 P.3d 604, 629 (2009).

¶13 In his sentencing memorandum, Sainz noted he "feels deep remorse" and "admits that he panicked in the heat of the moment" when committing the offense. At sentencing, the trial court stated it had considered Sainz's memorandum. Although the court was not required to consider this evidence, it apparently did so, and nevertheless concluded it was not sufficiently mitigating to merit a presumptive or mitigated sentence.

See Cazares, 205 Ariz. 425, ¶ 7, 72 P.3d at 357 (we presume sentencing court considered any relevant evidence before it). We will not second guess the court's determination on the issue of remorse when it had the benefit of witnessing the defendant's demeanor. *See State v. Sasak*, 178 Ariz. 182, 189, 871 P.2d 729, 736 (App. 1993). We thus find no abuse of discretion.

¶14 Sainz next argues the trial court erred in aggravating his sentence based upon an implicit finding that M.M.'s death was committed in an especially heinous, cruel, or depraved manner pursuant to § 13-701(D)(5). He claims the court made this finding when it described Sainz's offense as "one of the most brutal cases" it had been involved in. In his reply brief, Sainz acknowledges "there is nothing in the record suggesting this factor was found by the trial court." We agree. Although the court called Sainz's offense "brutal" while discussing the mitigating circumstances, the court never said it was finding the offense to be especially heinous, cruel, or depraved.

¶15 And, even if the trial court implicitly had determined the crime was committed in an especially heinous, cruel, or depraved manner, it would not have erred in doing so. "We consider the terms 'especially heinous, cruel or depraved' in the disjunctive." *State v. Hinchey*, 165 Ariz. 432, 438-39, 799 P.2d 352, 358-59 (1990). Thus, only one of these three factors listed in § 13-701(D)(5) must be proven in order for a sentence to be aggravated under this provision. "A murder is especially cruel . . . when the victim consciously 'suffered physical pain or mental anguish during at least some portion of the crime and . . . the defendant knew or should have known that the victim would suffer." *State v. Dixon*, 226 Ariz. 545, ¶ 61, 250 P.3d 1174, 1185 (2011), *quoting*

State v. Morris, 215 Ariz. 324, 338, 160 P.3d 203, 217 (2007). There is no minimum period of suffering required to prove the murder was especially cruel, *State v. Cropper*, 223 Ariz. 522, ¶ 13, 225 P.3d 579, 583 (2010), and evidence of a struggle can support a finding of cruelty, *State v. Johnson*, 229 Ariz. 475, ¶ 7, 276 P.3d 544, 547 (App. 2012).

¶16 Here, the state presented evidence that Sainz had stabbed M.M. fifteen times injuring M.M.'s chest, neck, face, back, arm, and thigh. M.M. also had defensive wounds on his hand and wrist. Sainz admitted that M.M. had expressed pain during the sixty-to-ninety-second confrontation, and other witnesses testified that M.M. had been gasping for air and crying out in pain. One witness described M.M. as lying on his back trying to kick Sainz away and using his hands to defend himself, while Sainz was "going full throttle" to beat him up. Thus, there was sufficient evidence from which the trial court could have found that the offense was committed in an especially cruel manner. *See* § 13-701(F).

¶17 Sainz lastly contends the trial court erred in concluding that the aggravating circumstances outweighed the mitigating ones. But as the state points out, the court is not required to make sentencing decisions based upon the mere numbers of aggravating and mitigating circumstances. *See Marquez*, 127 Ariz. at 7, 617 P.2d at 791. Rather, in determining what sentence to impose, the court must consider "the amount of aggravating circumstances and whether the amount of mitigating circumstances is sufficiently substantial to justify the lesser term." § 13-701(F).

¶18 Sainz nonetheless maintains the trial court erred by assigning any weight to his prior conviction, which was "wholly dissimilar and non-predictive" of his current

offense, or to the impact M.M.'s death had on his family because of their "prolonged period of voluntary estrangement." Sainz has cited no authority to support either proposition, and we are aware of none. Section 13-701(D)(11) specifies the following as an aggravating circumstance: "The defendant was previously convicted of a felony within the ten years immediately preceding the date of the offense." The statute does not require any similarity between the prior conviction and the current offense. And § 13-701(D)(9) provides that "if the victim has died as a result of the conduct of the defendant, [and] the victim's immediate family suffered physical, emotional or financial harm," it shall be treated as an aggravating circumstance. Again, the statute does not create any exception when the victim and his family are estranged.

¶19 Trial courts are vested with broad discretion in assigning weight to aggravating and mitigating circumstances. *State v. Harvey*, 193 Ariz. 472, ¶ 24, 974 P.2d 451, 456 (App. 1998). "[T]he existence of a single aggravating factor exposes a defendant to an aggravated sentence." *Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d at 625; *see also* § 13-701(F). Except in the limited manner noted above, Sainz does not dispute that his prior conviction is an aggravating circumstance. The court found additional mitigating and aggravating circumstances, evaluated them pursuant to § 13-701(F), and acted within its sound discretion in determining the aggravating circumstances outweighed the mitigating circumstances. *Cf. State v. Walton*, 133 Ariz. 282, 295-96, 650 P.2d 1264, 1277-78 (App. 1982) (presumptive sentence affirmed on appeal despite finding of six mitigating and three aggravating factors); *Aleman*, 210 Ariz. 232, ¶¶ 30, 35,

109 P.3d at 581 (aggravated assault sentences affirmed on appeal where prior DUI conviction used as aggravator).

Disposition

¶20 For the foregoing reasons, we affirm Sainz's conviction and sentence.

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

CONCURRING:

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

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