IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SALVADOR CELAYA,
Appellant.

No. 2 CA-CR 2012-0493
Filed April 10, 2014

Appeal from the Superior Court in Pima County
No. CR20113763001
The Honorable Jane L. Eikleberry, Judge

AFFIRMED IN PART AS CORRECTED; VACATED IN PART

COUNSEL

Lori J. Lefferts, Pima County Public Defender
By Frank P. Leto, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Kelly and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 Appellant Salvador Celaya was convicted after two separate jury trials of two counts of disorderly conduct, aggravated assault on a police officer, possession of a dangerous drug (methamphetamine), two counts of possession of a narcotic drug (cocaine and cocaine base), and possession of drug paraphernalia. After finding Celaya had three prior felony convictions, the trial court sentenced him to partially mitigated, concurrent and consecutive sentences totaling eleven years, to be followed by three concurrent terms of three years' probation. Counsel has filed a brief in compliance with *Smith v. Robbins,* 528 U.S. 259 (2000); *Anders v. California,* 386 U.S. 738 (1967); and *State v. Clark,* 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing he has reviewed the record but found no "meritorious issue for appeal" and asking this court to review the record for error. Celaya has filed a supplemental brief raising six issues. For the reasons set forth below, we affirm in part as corrected, and vacate in part.

Sufficiency of the Evidence

¶2 We view the evidence in the light most favorable to upholding the jury's verdicts. *See State v. Haight-Gyuro,* 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In October 2011, former police officer A.B. arrested Celaya based on a report that "a man [was] running through [a Tucson] apartment complex with a chainsaw." A witness testified that Celaya had "come[] around the corner [of the witness's apartment] with the chainsaw that was on," in front of a group of individuals that included children. Celaya threatened to "use" the chainsaw if the witness called the police and "hit[it] up against the door of [an apartment]."

¶3 A.B. arrived in a police car and tried to subdue Celaya, who "kept hitting the cop" in the face and head during the altercation, and "whacked" A.B.'s glasses off his face. A.B. suffered abrasions on his knees, a cut lip, and minor bruising, causing his face to be sore for a "couple of days." At the time of the arrest, A.B. found a pill bottle in Celaya's pocket that contained numerous bags yielding substances later confirmed to be methamphetamine, cocaine, and cocaine base. This evidence was sufficient to support Celaya's convictions. *See* A.R.S. §§ 13-2904(A)(6), 13-1204(A)(8)(a), 13-3407(A)(1), 13-3408(A)(1), 13-3415(A).

Supplemental Brief

¶4 Celaya raises six arguments in his supplemental brief, asserting each constitutes fundamental, "'structural error.'" He first argues the trial court erred by failing to strike one of the jurors who informed the bailiff after the trial had begun that he had neglected to explain certain information to the court during voir dire, none of which the juror thought would affect his ability to perform as a juror. The bailiff relayed the juror's specific concerns to the judge and the attorneys. Although the judge stated the information did not "cause[her] any concern," she asked the attorneys if they wanted to question the juror further. Both attorneys declined, and defense counsel stated, "I don't think that we need to have any further questions."

¶5 Celaya argues the trial court's failure to strike the juror denied him the right to a fair trial, and the court improperly "allowed hearsay," presumably by permitting the bailiff to communicate the juror's concerns to the judge and attorneys. Celaya has not asserted any prejudice resulting from the court's failure to strike the juror, nor did he object on this ground when he had the opportunity to do so. In fact, his attorney declined the opportunity to question the juror further. Moreover, the bailiff's communication regarding his conversation with the juror did not constitute hearsay. *See* Ariz. R. Evid. 801(c) (defining hearsay as a statement, other than one made by declarant at trial or hearing, offered in evidence to prove truth of matter asserted). We thus find no error, fundamental or otherwise.

¶6 Second, Celaya argues the trial court improperly considered his 1993 convictions for aggravated driving under the influence of an intoxicant (DUI) as historical prior felony convictions for enhancement purposes. After considering the parties' written memoranda to determine whether "designating the [DUI] convictions would constitute an illegal *ex post facto* application of A.R.S. § 13-105(22)," the court found it would not. Relying on § 13-105(22)(a)(iv) (prior conviction for aggravated DUI constitutes historical prior felony conviction regardless when committed), and *State v. Thomas,* 219 Ariz. 127, ¶¶ 7-11, 194 P.3d 394, 396-97 (2008), the court concluded that "any prior conviction for an offense listed in former A.R.S. § 13-604(W)(2)(a)—which included aggravated [DUI]—can be designated a historical prior felony conviction regardless of when the offense occurred," as long as the prior conviction occurred before the defendant was convicted of the instant offense. Celaya has not explained how the court erred in so finding, nor can we conclude that it did.

¶7 Third, noting that the drug and assault charges were addressed at separate trials, Celaya maintains the trial court wrongfully denied his motion to depose A.B., who he maintains was a victim only in the assault matter. Although there were separate trials, because the offenses occurred on the same occasion, A.B. was entitled to refuse to be interviewed in both matters, and thus the court properly denied Celaya's motion to depose him. *See* A.R.S. § 13-4433(A) ("victim shall not be compelled to submit to an interview on any matter, including any charged criminal offense witnessed by the victim and that occurred on the same occasion as the offense against the victim, or filed in the same indictment . . . ."); *cf. State v. Stauffer,* 203 Ariz. 551, ¶ 7, 58 P.3d 33, 35 (App. 2002) ("victim's right to refuse to be interviewed about the offense committed against that victim is inviolate, even as to other offenses allegedly committed on the same occasion by the defendant"), *relying on Champlin v. Sargeant,* 192 Ariz. 371, ¶ 18, 965 P.2d 763, 767 (1998).

¶8 Fourth, asserting he faced a potential prison term of 50.75 years, Celaya contends he was entitled to a twelve- rather than

an eight-person jury at the trial on the drug charges. *See* Ariz. Const. art. II, § 23 (when defendant faces death or thirty years or more imprisonment, the jury "shall consist of twelve persons"); *see also* A.R.S. § 12-102(A). When the maximum potential sentence is less than thirty years, an eight-member jury is permissible. *See* A.R.S. § 1-102(B). Before trial, the parties discussed the number of jurors required. Because all of the drug offenses with the exception of the methamphetamine offense were probation-mandatory, a fact the state did not dispute, and because the longest sentence Celaya could have received for the methamphetamine offense did not exceed thirty years, he was not at risk for a sentence longer than thirty years. *See* A.R.S. §§ 13-901.01(A), (H)(4); 13-703(J). An eight-person jury therefore was proper.

¶9 Fifth, Celaya asserts the jury instruction for aggravated assault on a police officer was "duplicitous." Celaya has not provided any argument, much less one establishing fundamental error, explaining why the proffered instruction was deficient. Merely asserting his claim constitutes fundamental error does not make it so, nor do we find any such error. *See State v. Henderson,* 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005) (burden rests on defendant to "establish . . . that fundamental error exists"); *cf. State v. Fernandez,* 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650-51 (App. 2007) (we will not ignore fundamental error if we find it).

¶10 Finally, Celaya argues the state did not prove beyond a reasonable doubt that he caused A.B. any physical injury, despite the jury having so found on the verdict form. A person commits aggravated assault by committing an assault pursuant to § 13-1203 and "knowing or having reason to know that the victim is . . . [a] peace officer." A.R.S. § 13-1204(A)(8)(a). Aggravated assault against a peace officer is a class four felony if it "results in any physical injury." A.R.S. § 13-1204(E). "'Physical injury' means the impairment of physical condition." A.R.S. § 13-105(33). Celaya argues that because A.B. testified his cut lip did not "impair" him, that injury was not a "physical injury."

¶11 No statute defines the terms "impairment" or "physical condition" as used in this context, nor did the jury instructions

include definitions of those terms. "In the absence of statutory definitions, we give words their ordinary meaning." *State v. Cox,* 217 Ariz. 353, ¶ 20, 174 P.3d 265, 268 (2007), *see also* A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language."). The word "impairment" is "not a technical term requiring an explanation to the average juror." *Cox*, 217 Ariz. 353, ¶ 20, 174 P.3d at 268. Not only did A.B. testify that Celaya had "hit [him] with an elbow to the face" and "head butted [him]," and that he had sustained a cut lip and other abrasions, but the jury was shown photographs of those injuries. Therefore, A.B.'s injuries, although apparently minor, entailed some impairment of his normal appearance and could be considered a physical injury. *Cf. State v. George,* 206 Ariz. 436, ¶¶ 7-14, 79 P.3d 1050, 1054-57 (App. 2003) (differentiating mere physical injury from serious physical injury).

¶12 Celaya's sentences and the imposition of probation were within the prescribed statutory range and imposed lawfully. *See* A.R.S. §§ 13-703(J), 13-901.01, 13-902(A)(3). The sentencing minute entry, however, provides that the "fines, fees, and assessments" the court had imposed were "reduced to a Criminal Restitution Order [CRO] . . . ." But this court has determined that, based on A.R.S. § 805(C)(1), the imposition of a CRO for "fines, costs, incarceration costs, fees, surcharges or assessments imposed" before the defendant absconds or his probation or sentence has expired constitutes an illegal sentence. *See State v. Cota,* 681 Ariz. Adv. Rep. 7, ¶ 1 (Ct. App. Feb. 25, 2014). Therefore, this portion of the sentencing minute entry order is not authorized by statute and is vacated.

¶13 In addition, in reviewing the record for fundamental error, we have discovered two discrepancies in the sentencing minute entry. The trial court mistakenly referred to A.R.S. § 13-1204(A)(5) instead of subsection (A)(8) for the offense of aggravated assault on a police officer in count three, and it mistakenly identified count five as possession of cocaine base, rather than cocaine. Therefore, we order the sentencing minute entry corrected accordingly.

Disposition

¶14 Pursuant to our obligation under *Anders,* we have searched the record for fundamental, reversible error and found none with the exception of the improper CRO. *See State v. Fuller,* 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) (*Anders* requires court to search record for fundamental error). Accordingly, the CRO is vacated; Celaya's convictions, and his disposition and sentences as corrected are otherwise affirmed.