IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DANIEL ZEEK HARPER,
Appellant.

No. 2 CA-CR 2014-0297
Filed April 29, 2016

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20133067001
The Honorable Christopher C. Browning, Judge

AFFIRMED IN PART AND REMANDED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Kathryn A. Damstra, Assistant Attorney General, Tucson
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Abigail Jensen, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 After a jury trial, Daniel Harper was found guilty of burglary, kidnapping, criminal damage, and four counts of aggravated assault. The trial court sentenced him to concurrent, enhanced prison sentences, the longest of which is 11.5 years, followed by eight years of probation. On appeal, Harper challenges one of his convictions for aggravated assault based on an improper jury instruction, the sufficiency of the evidence on the criminal damage conviction, and the legality of his sentences. He also challenges the trial court's jurisdiction to alter restitution more than sixty days after sentencing. For the following reasons, we modify one of Harper's convictions, affirm the other convictions and sentences, and remand for resentencing on two of the aggravated assault convictions.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Payne*, 233 Ariz. 484, 496 n.1, 314 P.3d 1239, 1251 n.1 (2013). On the morning of July 20, 2013, C.P. awoke to someone banging at her bedroom window, and recognized a voice outside as that of Harper, the father of her then three-year-old daughter. C.P. called 9-1-1 and was standing a "few feet away" from her closed bedroom window when it was shattered from outside. C.P. ran out of the room and down the hall, where she encountered Harper inside the house near her open front door. Harper hit C.P. in the face, and she lost consciousness.

¶3 When police arrived, they found C.P. on the ground outside the front door, surrounded by broken glass and blood. Paramedics arrived and eventually transported her to a hospital. Officers found the front door open and badly damaged, and observed glass from a broken wine bottle and a smashed vase in the living room, kitchen, and hallway. There was also a brick on the floor of C.P.'s bedroom, and the windshield of her car had been broken.

¶4 The state alleged Harper dragged C.P. through the broken glass of "a wine bottle and/or a vase(s)" alleged as dangerous instruments when he moved her unconscious body. The evidence showed C.P. suffered abrasions and lacerations on her legs, glass embedded in her shoulder, a "through and through laceration" of her lip, two black eyes, and a broken tooth that required replacement with a surgical implant.

¶5 An amended indictment charged Harper with domestic violence aggravated assault with a dangerous instrument (count one); two counts of domestic violence aggravated assault causing temporary but substantial disfigurement (counts two and three); one count of domestic violence aggravated assault causing serious physical injury (count four); first-degree burglary (count five); domestic violence kidnapping (count six); and criminal damage over $10,000 (count seven). The jury found Harper guilty as charged on all counts and determined counts one, four, and five were dangerous-nature offenses. At sentencing, the trial court mistakenly found that the kidnapping conviction was included in the jury's dangerous-nature offense determination.

¶6 The trial court sentenced Harper to concurrent, slightly aggravated prison terms on counts one, four, five, and six, followed by terms of probation on counts two, three, and seven. The court ordered Harper to pay restitution of $3,998.30 to the Pima County Victim Compensation Fund, and at a later, separate restitution hearing, an additional sum of $14,154.30 in restitution to C.P.'s parents who owned the home where she was assaulted.

¶7 The trial court subsequently permitted Harper to file a delayed notice of appeal from his convictions, sentences, and post-sentencing restitution order. *See* Ariz. R. Crim. P. 31.3(b) and 32.1(f). We have jurisdiction over Harper's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Serious Physical Injury Jury Instruction

¶8 Harper first argues the trial court erred in instructing the jury as to what constitutes "serious physical injury." We review whether jury instructions properly state the law de novo,[1] *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997), but will reverse a trial court's decision to give an instruction only when the instructions, taken as a whole, misled the jurors. *State v. Petrak*, 198 Ariz. 260, ¶ 9, 8 P.3d 1174, 1178 (App. 2000).

¶9 With respect to count four of the amended indictment—concerning the injury to C.P.'s tooth—the trial court instructed the jury:

> The crime of aggravated assault, serious physical injury requires proof of the following two things: 1. that the defendant intentionally, knowingly or recklessly caused physical injury to another; and, 2. the assault was aggravated by the following factor: A. the defendant caused serious physical injury to another person.
>
> "Serious physical injury" includes physical injury that causes serious and permanent

[1]Although no objection was made at the time the instruction was read to the jury, Harper sufficiently preserved the issue during his oral Rule 20 motion when he objected to the part of the definition which "isn't listed in the statute."

> disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb, *or a fracture of any body part*. (Emphasis added.)

Harper contends the trial court's definition of "serious physical injury" as including "fracture of any body part" was reversible error. The state concedes error on appeal.

¶10 "Serious physical injury" is defined in A.R.S. § 13-105(39) as a "physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb." Such an assault is a class three felony. *See* A.R.S. § 13-1204(A)(1), (D). In contrast, an aggravated assault that causes "temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part *or a fracture of any body part*" is a class four felony. § 13-1204(A)(3), (D) (emphasis added).

¶11 Here, during Harper's oral motion pursuant to Rule 20, Ariz. R. Crim. P., the parties discussed C.P.'s injuries and the statutory definitions in relation to the proposed jury instructions. The state agreed the language in the instructions should mirror that of the statutes, but the change was not made. By including "a fracture of any body part" in the instruction, the court allowed the jury to apply an element of a class four felony to find Harper guilty of a class three felony.

¶12 Instructional errors are subject to a harmless error analysis, and will be deemed innocuous if it appears "'beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained.'" *State v. Dann*, 205 Ariz. 557, ¶ 18, 74 P.3d 231, 239 (2003), *quoting Chapman v. California*, 386 U.S. 18, 24 (1967). Although there was medical evidence at trial that a tooth is an organ, Harper urged the jury it was not required to accept that assessment, asserting "regardless what you may have heard from the doctor, a tooth is not

an organ. Rub your . . . tongue over your own teeth. Feels like bone because that's what it is." It cannot be determined whether the jury relied on the doctor's testimony or instead Harper's theory relating to the "fracture of any body part" when it found him guilty of committing the serious physical injury. The state concedes the error cannot be characterized as harmless, agreeing the guilty verdict was likely premised on the erroneous portion of the instruction.

¶13 Harper argues the erroneous instruction merits reversal of his conviction and a remand for a new trial. The state suggests there was more than sufficient evidence to support a conviction for aggravated assault causing temporary but substantial injury, and argues the proper remedy is modification of the judgment to reflect conviction of the class four felony and remand to the trial court for resentencing. We agree with the state.

¶14 In *State v. George*, this court held that although the jury "could not have lawfully found George guilty beyond a reasonable doubt of aggravated assault resulting in serious physical injury," the evidence "was more than adequate to support a conviction for the necessarily included offense of aggravated assault causing temporary but substantial impairment . . . , a class four felony." 206 Ariz. 436, ¶ 14, 79 P.3d 1050, 1056-57 (App. 2003). As in *George*, the state in this case presented sufficient evidence from which a jury reasonably could have concluded that C.P.'s fractured tooth was a temporary but substantial injury, even if it did not qualify as a serious physical injury. Accordingly, we modify the judgment to reflect Harper's conviction for the necessarily included lesser offense and remand that count to the trial court for resentencing. *See* Ariz. R. Crim. P. 31.17(d); *George*, 206 Ariz. 436, ¶ 11, 79 P.3d at 1056-57.

Sufficiency of the Evidence

¶15 Harper next maintains the state presented insufficient evidence to support a conviction for criminal damage in excess of $10,000. He argues the evidence presented at trial showed total damages of only $9,896, and thus the trial court erred in denying his motion for a judgment of acquittal on the criminal damage charge.

We review this issue de novo, considering the evidence and inferences drawn from it in the light most favorable to sustaining the verdict. *See State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). A conviction based on insufficient evidence warrants reversal only if there is a complete absence of substantial evidence such that a rational person could accept it as adequate to support a finding of guilt beyond a reasonable doubt. *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990); *see also State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996).

¶16 The burden of proving damage amounts rests with the state. *State v. Brockell*, 187 Ariz. 226, 229, 928 P.2d 650, 653 (App. 1996). No particular method for calculating damages is required; instead, the amount "is determined by applying a rule of reasonableness to the particular fact situation presented." *Id.* at 228, 928 P.2d at 652. The general rules for determining damage to property should be flexible guides in determining loss, but when personal property is susceptible to repair, the proper measure is the reasonable cost of repair. *See id.*

¶17 Viewed in the appropriate light, there was specific evidence presented at trial that Harper caused $9,896 worth of damage. However, C.P.'s mother additionally testified to a broken bedroom window, a missing decorative bowl, and two broken glass vases, for which no replacement or repair values were offered. Applying principles of reasonableness and common sense, the jury could find proven beyond a reasonable doubt that the costs to replace the window, bowl, and two vases would have exceeded the $104 necessary to satisfy the statutory threshold for a class four felony under A.R.S. § 13-1602(B)(1). *See Brockell*, 187 Ariz. at 228, 928 P.2d at 652 (applying rule of reasonableness when calculating damage amounts); *State v. Printz*, 125 Ariz. 300, 304, 609 P.2d 570, 574 (1982) (when determining value, jury may use common sense). Accordingly, we find the guilty verdict supported by sufficient evidence and no error in the trial court's denial of Harper's judgment of acquittal motion.

Aggravating Factors

¶18 Harper argues that no aggravating factors were submitted to the jury and therefore his "slightly aggravated" prison sentences for counts one, four, five, and six cannot stand. Although an illegal sentence constitutes fundamental error, *State v. McPherson*, 228 Ariz. 557, ¶ 4, 269 P.3d 1181, 1183 (App. 2012), because the sentences were not objected to below, Harper must demonstrate prejudice to be entitled to relief, *State v. Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d 601, 608 (2005) ("To prevail under [fundamental error] review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice."); *State v. Molina*, 211 Ariz. 130, ¶ 21, 118 P.3d 1094, 1100 (App. 2005).

¶19 Here, the trial court found two aggravating factors at the time of sentencing: "extreme physical and emotional harm to the victim," and "the infliction of what can only be described as gratuitous violence on the victim after she was incapacitated." In support, the court noted the "disturbing and graphic testimony about the senseless, brutal attack from [C.P.] herself, from the first responders who attended to her, [and] from her physician who treated her." The court additionally cited the "numerous photographs of the multiple injuries suffered by [C.P.] and the significant damage to the [P.] house," ultimately concluding that Harper had "acted with extreme rage when [he] beat and terrorized [C.P.]." In mitigation, the court cited Harper's age, his efforts at self-improvement, and significant family and community support. Giving more weight to the aggravating circumstances, the court imposed "slightly aggravated" concurrent prison terms on counts one, four, five, and six.

¶20 In accordance with *Blakely v. Washington*, "'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" 542 U.S. 296, 301 (2004), *quoting Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Here, no aggravating factors were submitted to the jury, and the imposition of prison sentences exceeding the presumptive sentence set forth in the dangerous

offender sentencing statutes constitutes fundamental error. *See State v. Brown*, 209 Ariz. 200, ¶¶ 12-13, 99 P.3d 15, 18 (2004) (clarifying that absence of aggravating factors found in accordance with *Apprendi* and *Blakely*, a presumptive sentence is the "statutory maximum" in Arizona). We will not disturb Harper's sentence, though, absent a showing of prejudice. *See Molina*, 211 Ariz. 130, ¶ 15, 118 P.3d at 1098. An adequate showing of prejudice requires Harper to demonstrate that a reasonable jury, applying a standard of proof beyond a reasonable doubt, could have reached a different result than did the trial court. *Id.*; *Henderson*, 210 Ariz. 561, ¶¶ 26-27, 115 P.3d at 608-09.

¶21 As noted above, the trial court cited extreme physical and emotional harm to the victim and gratuitous violence as aggravating factors. *See* A.R.S. § 13-701(D)(9) (enumerating victim's "physical, emotional or financial harm" as an aggravating factor). Under the facts of this case, we cannot conclude Harper was prejudiced. At trial, C.P. testified she remembered being hit in the face by Harper before blacking out and waking up on a stretcher on her way to the hospital. Both an emergency room physician and a periodontist testified at length about C.P.'s injuries, including a "through and through" laceration to the lip, a significant laceration to her left leg, two black eyes, and a fractured tooth.

¶22 Given the overwhelming evidence of C.P.'s injuries, we conclude no reasonable jury could have failed to find that she suffered physical harm as contemplated in § 13-701(D)(9). Our conclusion is buttressed by the fact that the jury convicted Harper of aggravated assault under a theory which required a finding of actual physical injury.[2] "Where the degree of the defendant's misconduct

[2]The court's final jury instruction No. 24 reads:

> The crime of aggravated assault, temporary/substantial disfigurement, domestic violence requires proof of the following: 1. the defendant intentionally,

rises to a level beyond that which is merely necessary to establish an element of the underlying crime, the trial court may consider such conduct as an aggravating factor." *State v. Germain*, 150 Ariz. 287, 290, 723 P.2d 105, 108 (App. 1986); *see also State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005) (once single aggravating factor found by jury, Sixth Amendment permits finding and considering additional factors relevant to imposition of a sentence up to the maximum prescribed). Harper therefore has established no prejudice from the trial court's aggravation of his sentences on counts one, four, five, and six.

Dangerous Nature of Kidnapping Charge

¶23 Harper similarly contends the trial court improperly enhanced his sentence on count six, kidnapping, under the dangerous offenders sentencing scheme. He argues that because the dangerous nature of the conviction was not found by the jury, nor is dangerousness an element of kidnapping, his enhanced, 11.5-year prison sentence should be remanded to the trial court for resentencing as a nondangerous offense. Because Harper failed to raise this claim below, we again review the court's decision for fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08. Imposition of an illegal sentence is fundamental error, *McPherson*, 228 Ariz. 557, ¶ 4, 269 P.3d at 1183, however, if a sentence is within statutory limits, we will not disturb the trial court's penalty determination absent an abuse of discretion, *State v. Calderon*, 171 Ariz. 12, 13, 827 P.2d 473, 474 (App. 1991).

> knowingly or recklessly caused any physical injury to another person with whom the defendant resided in the same household and/or has a child in common; and, 2. the defendant committed the assault by any means of force which caused temporary but substantial disfigurement or loss or impairment of any body part.

¶24 At sentencing, the trial court pronounced Harper "guilty of Count 6 . . . kidnapping, domestic violence, non-dangerous, non-repetitive Class 2 felony . . ." and then suspended the imposition of sentence and placed him on probation for that count, but the prosecutor interjected stating, "Count 6 is not a non-dangerous offense, so he can't be given probation for that one." The trial court agreed and altered Harper's sentence on count six to a slightly aggravated prison term of 11.5 years, to be served concurrently with his prison terms on counts one, four, and five.

¶25 Section 13-105(13), A.R.S., defines dangerous offenses as those "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 an element of the charged offense contains an allegation which requires proof of dangerousness, any dangerous nature allegation must be submitted to the jury for a separate finding. *See* A.R.S. § 13-704(L); *State v. Parker*, 128 Ariz. 97, 98, 624 P.2d 294, 296 (1981); *State v. Larin*, 233 Ariz. 202, ¶ 38, 310 P.3d 990, 1000 (App. 2013).

¶26 Count six of Harper's amended indictment reads, in its entirety,

> On or about the 20th day of July, 2013, DANIEL ZEEK HARPER kidnapped CHRISTINE P[.], with the intent to inflict death, physical injury or a sexual offense on her, in violation of A.R.S. §§ 13-1304(A)(3) and (B), 13-3601.

The language in the trial court's jury instruction, however, mirrored A.R.S. § 13-1304(A)(3), in which kidnapping is defined as "knowingly restraining another person with the intent to . . . [i]nflict death, physical injury or a sexual offense on the victim, *or to*

otherwise aid in the commission of a felony."[3] (Emphasis added.) Inclusion of the clause "or otherwise to aid in the commission of a felony" as an element of the offense may negate a finding of inherent dangerousness, *State v. Lee*, 185 Ariz. 549, 560, 917 P.2d 692, 703 (1996); *see also Larin*, 233 Ariz. 202, n.6, 310 P.3d at 1001 n.6, and under the facts alleged here, dangerousness is not inherent in the kidnapping conviction.

¶27 Accordingly, Harper could only be sentenced under the dangerous offenders sentencing scheme if the jury specifically found the offense to be of a dangerous nature. Although the verdict forms for counts one, four, and five do contain separate interrogatories indicating the dangerous nature of the conviction to be proven beyond a reasonable doubt, the verdict form for count six does not.

¶28 As Harper's 11.5-year prison term exceeds the maximum sentence allowable[4] for a class two, nondangerous felony, and because the record before us does not show the jury found Harper's kidnapping conviction to be of a dangerous nature, we conclude the trial court committed fundamental error when it sentenced Harper under the dangerous offenders sentencing scheme pursuant to § 13-704. *McPherson*, 228 Ariz. 557, ¶ 4, 269 P.3d at 1183 (imposition of illegal sentence fundamental error). However, as noted in our discussion on aggravating factors above, Harper must demonstrate prejudice to be entitled to relief. *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08. Thus, because the court enhanced

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[3]There being no evidence of a sexual offense here, the court's final jury instruction read: "A person commits kidnapping by knowingly restraining another person with the intent to inflict death or physical injury or to otherwise aid in the commission of a felony."

[4]As discussed earlier, Harper was not prejudiced by the trial court's finding of physical injury to aggravate his sentences. Pursuant to A.R.S. §§ 13-701(C), 13-702(D), however, the maximum sentence for a class two felony with one aggravating factor is a ten-year prison term.

Harper's sentence without adequate proof of dangerousness, we must consider whether a reasonable jury, applying a standard of proof beyond a reasonable doubt, could have failed to find the kidnapping offense to be of a dangerous nature.[5] *See id.* ¶ 18.

¶29 The state's theory of the kidnapping charge alleged that Harper restrained C.P. in her home by incapacitating her and dragging her unconscious body through broken glass. Because the jury found the broken glass to be a dangerous instrument for counts one, four, and five, we conclude that no reasonable jury would have failed to find beyond a reasonable doubt the kidnapping charge also of a dangerous nature. *See Molina*, 211 Ariz. 130, ¶ 21, 118 P.3d at 1100 (inquiring whether reasonable jury, applying appropriate standard of proof, could have reached different result than trial judge). Accordingly, finding no prejudicial impact from the trial court's sentence enhancement, we affirm the sentence imposed on the kidnapping charge.

Consecutive Probation Terms

¶30 Harper next contends the imposition of probation terms consecutive to his prison terms violates A.R.S. § 13-116 and constitutes an illegal sentence. This issue too is raised for the first time on appeal, thus we review for fundamental error. *Henderson,* 210 Ariz. 561, ¶ 19, 115 P.3d at 607. A trial court's decision to impose consecutive sentences under § 13-116 is reviewed using the test set forth in *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1989). *See State v. Styers*, 177 Ariz. 104, 113, 865 P.2d 765, 774 (1993); *State v. Cornish*, 192 Ariz. 533, ¶¶ 19-20, 968 P.2d 606, 611 (App. 1998) (consecutive term of probation upheld applying *Gordon* analysis).

[5]We note the trial court did not make an explicit finding of dangerousness, but instead sentenced Harper under the mistaken belief that the jury had found the offense to be a dangerous-nature offense pursuant to § 13-704. That fact does not change our analysis.

Under *Gordon*, the court first considers "the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge." 161 Ariz. at 315, 778 P.2d at 1211. If, after doing so, there is enough remaining evidence to satisfy each element of the secondary crime, consecutive sentences are appropriate. *Id.* The court next considers the entire "transaction," determining whether it was factually impossible to commit the ultimate crime without also committing the secondary crime. *Id.* Finally, the court will consider "whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime." *Id.* "If so, then ordinarily the court should find the defendant committed multiple acts and should receive consecutive sentences." *Id.*

Counts Two and Four

¶31 Harper argues the aggravated assault convictions in count two (temporary/substantial disfigurement for laceration to upper lip) and count four (serious injury for a knocked out tooth) occurred as a result of the initial blow to C.P.'s face, and thus must be considered the same act under *Gordon*. The state concedes this point, and agrees with Harper that a term of probation on count two consecutive to the prison term on count four is not permitted. We agree and accordingly remand for resentencing on count two, which, in accordance with § 13-116, must be served concurrently with the prison term on count four.

Counts Five and Seven

¶32 Harper similarly alleges his burglary and criminal damage convictions constitute the same act under *Gordon*, requiring concurrent sentences. Considering the more serious burglary conviction the ultimate crime and subtracting the facts upon which the burglary is based, Harper argues there was insufficient evidence to support criminal damage in excess of $10,000. For a defendant to be convicted of first-degree burglary, the state must prove beyond a reasonable doubt he entered or remained unlawfully in or on a

residential structure with the intent to commit any felony therein while knowingly possessing a deadly weapon or dangerous instrument. *See* A.R.S. §§ 13-1507, 13-1508. The evidence here is that Harper damaged the front door in gaining access to the home and the victim. The value of the damaged door, however, is not an element of burglary, and need not be subtracted from the factual evidence supporting the criminal damage conviction.

¶33 Under the next step of the *Gordon* test we consider whether it would have been impossible for Harper to have committed the criminal damage without also committing the burglary, and conclude it was not impossible. Evidence that Harper intended to commit a felony when he entered or unlawfully remained in the home, while knowingly in possession of a dangerous instrument, is all that was needed to convict him of the ultimate crime. Again, evidence of damaged property was not. *See* §§ 13-1507, 13-1508.

¶34 Finally, we inquire as to whether committing the criminal damage caused an additional risk of harm, and conclude that it did. Given the excessive costs of repairing the extensive damage to C.P.'s parents' house, the property owners and victims of the criminal damage charge suffered additional harm over that sustained in the burglary by itself. *See State v. Belyeu*, 164 Ariz. 586, 591, 795 P.2d 229, 234 (App. 1990) (affirming consecutive sentences for criminal damage and burglary conviction, and concluding victims "suffered additional harm by virtue of the criminal damage"). On these facts, Harper's consecutive sentences for burglary and criminal damage were permissible.

Counts One and Three

¶35 Harper also argues the trial court erred in imposing consecutive sentences on aggravated assault counts one and three. Count one charged aggravated assault, dangerous instrument for use of a wine bottle or vase, while count three charged aggravated assault, temporary but substantial disfigurement for a laceration to C.P.'s left leg. The state's theory was that the left leg laceration

occurred as C.P. was dragged though broken glass while unconscious. The evidence presented at trial showed there was broken glass not only from the shattered wine bottle and two glass vases, but also from a broken window and a decorative bowl. Thus, the state argues, it was factually possible to cause the leg laceration without the broken glass from either the vases or the wine bottle. Similarly, under the second prong of the *Gordon* analysis it would have been possible to commit the temporary but substantial disfigurement without the broken wine bottle and vases alleged as dangerous instruments. And lastly, there was a risk of harm in the temporary but substantial disfigurement conviction above and beyond that already inherent in the dangerous instrument conviction. Accordingly, we conclude consecutive sentences on counts one and three do not violate § 13-116's proscription of double punishments for single acts.

Restitution Jurisdiction

¶36 Harper finally alleges the trial court lacked jurisdiction to amend the restitution order more than sixty days after pronouncement of his sentence. Jurisdictional issues present pure questions of law, which we review de novo. *State v. Zaputil*, 220 Ariz. 425, ¶ 7, 207 P.3d 678, 680 (App. 2008). At sentencing, the trial court noted a lack of information to award restitution to the property owners, and expressed its intent to retain jurisdiction over the matter pending the filing of an affidavit. Seventy days after Harper's sentencing, the court held a restitution hearing and awarded the full restitution amount requested.

¶37 Harper offers alternative arguments on appeal. He first contends the trial court violated Rule 24.3, Ariz. R. Crim. P., and acted without jurisdiction by modifying his "illegal sentence" more than sixty days after its pronouncement. Although we agree a trial court cannot modify a sentence more than sixty days after

sentencing,[6] we do not find a sentence lacking restitution to be illegal when restitution is expressly held open.

¶38 The Arizona Legislature has made clear that restitution to victims of crime is required. A.R.S. § 13-603(C); *State v. Holguin*, 177 Ariz. 589, 591, 870 P.2d 407, 409 (App. 1993); *see also* Ariz. Const. art. II, § 2.1(A)(8). The statutes governing restitution, however, are noticeably silent on when restitution must be ordered. *See* A.R.S. §§ 13-603, 804, and 805. Although restitution is generally ordered at the time of sentencing, a restitution order may not be imposed absent sufficient evidence supporting the award. *Holguin*, 177 Ariz. at 591, 870 P.2d at 409. If there is insufficient evidence supporting a specific award, the trial court is authorized under § 13-804(G) to conduct a restitution hearing. Harper cites no authority for his contention that restitution must be ordered at the time of sentencing, nor do we find any. Accordingly, we cannot say the trial court erred in retaining jurisdiction over restitution pending the filing of an affidavit.

¶39 Harper alternatively argues the trial court lacked jurisdiction to modify a legal sentence, citing *State v. Serrano*, 234 Ariz. 491, ¶ 9, 323 P.3d 774, 777 (App. 2014). In that case, this court vacated the trial court's order modifying a sentence to require registration as a sex offender three weeks after sentencing. *Id.* at ¶¶ 12, 16, 323 P.3d at 778-79. We held that because registration was discretionary, defendant's original sentences "were not unlawful,"

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[6]*See* Rule 24.3 (A "court may correct any unlawful sentence or one imposed in an unlawful manner within 60 days of the entry of judgment and sentence but before the defendant's appeal, if any, is perfected."); *State v. Bryant*, 219 Ariz. 514, ¶¶ 8, 11, 200 P.3d 1011, 1013-14 (App. 2008) (adhering strictly to sixty-day deadline and finding no permissible exceptions even though motion to correct illegal sentence was filed within the deadline and defendant contributed to the delay, but order correcting error entered more than sixty days after sentence pronounced).

were "'complete and valid' upon oral pronouncement, and [could not] be modified thereafter except as provided by Rule 24.3, Ariz. R. Crim. P." *Id.* at ¶ 9, 323 P.3d at 777, *quoting* Ariz. R. Crim. P. 26.16(a) (citation omitted).

¶40 Harper maintains we must similarly conclude the trial court lacked jurisdiction to modify his sentence by ordering additional restitution. *Serrano*, however, is distinguishable. The discretionary registration order there was clearly a modification of the "'complete and valid'" sentence imposed three weeks earlier. *Id.*, *quoting* Ariz. R. Crim. P. 26.16(a). In contrast, the trial court here expressly held open the issue of the non-discretionary restitution to C.P.'s parents, entering no final judgment on the matter. Accordingly we disagree with Harper's characterization of the deferred imposition of restitution as a "modification" of his sentence. As discussed above, Harper cites no authority for his contention that restitution must be ordered at sentencing, and we find no error with the trial court's decision to await the filing of an affidavit before making its restitution determination.

Disposition

¶41 For the foregoing reasons, the judgment on count four is modified to a class four felony and remanded for resentencing. Also remanded is count two for resentencing concurrent with count four. Harper's remaining convictions and sentences, as well as all restitution ordered, are affirmed.