IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MELVIN EMERSON RIVERA,
Appellant.

No. 2 CA-CR 2015-0265
Filed May 16, 2016

Appeal from the Superior Court in Pinal County
No. S1100CR201300990
The Honorable Bradley M. Soos, Judge

AFFIRMED

COUNSEL

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

Harriette P. Levitt, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 After a jury trial, Melvin Rivera was convicted of sexual assault pursuant to A.R.S. § 13-1406(A). The trial court sentenced him to a presumptive, seven-year prison term pursuant to § 13-1406(B). No aggravating factors were presented to the jury. In imposing the presumptive seven-year prison term, however, the court found one aggravating factor—harm to the victim—and one mitigating factor—that Rivera had no criminal history. On appeal, Rivera contends he is entitled to resentencing because the aggravating factor was not found by the jury.[1] We affirm.

¶2 Rivera argues that, pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000),

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[1] Rivera did not raise this argument below, and the state asserts we should review his claims for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) ("defendant who fails to object at trial forfeits the right to obtain appellate relief" unless defendant shows fundamental, prejudicial error). The trial court imposed sentence immediately after finding the aggravating factor and, thus, whether Rivera was required to object to preserve this issue could be subject to this court's analysis in *State v. Vermuele*, 226 Ariz. 399, ¶ 6, 249 P.3d 1099, 1101 (App. 2011) (defendant did not waive ordinary appellate review by failing to object during or following imposition of sentence). However, because we find no error, fundamental or otherwise, we need not decide whether Rivera forfeited his rights as contemplated in *Henderson* or whether *Vermuele* applies.

"it was incumbent upon the state to prove any aggravating factors prior to sentencing" and that "it was improper for the [trial] court to find an aggravating factor of its own accord." Thus, he concludes, because the court also found a mitigating factor, he is entitled to be resentenced to a prison term less than the presumptive term.

¶3 We rejected a similar argument in *State v. Johnson*, 210 Ariz. 438, 111 P.3d 1038 (App. 2005). As we explained in that case, *Blakely* and *Apprendi* require a jury to find any fact other than a prior conviction that increases the penalty for a crime above the statutory maximum. *Johnson*, 210 Ariz. 438, ¶ 9, 111 P.3d at 1040-41. The statutory maximum is the presumptive term. *Id.* ¶ 10. However, if the trial court imposes a sentence no greater than the presumptive term, it may find and consider aggravating factors not found by a jury, even if the aggravating factor "played an essential role in the punishment the trial court chose." *Id.* ¶¶ 10-12; *cf. State v. Olmstead*, 213 Ariz. 534, ¶ 6, 145 P.3d 631, 632 (App. 2006) (trial court not required to make sentencing decision based on "'mere numbers of aggravating or mitigating circumstances'" but instead has "broad discretion to decide if the mitigating factors were sufficient to justify a mitigated sentence"), *quoting State v. Willcoxson*, 156 Ariz. 343, 347, 751 P.2d 1385, 1389 (App. 1987). Thus, because the court in this case imposed the presumptive term, it was entitled to find and consider aggravating factors, and no violation of *Blakely* and *Apprendi* occurred.

¶4 Rivera's conviction and sentence are affirmed.