IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Appellee*,

*v.*

ANDREW BRADFORD TREE,
*Appellant*.

No. 2 CA-CR 2016-0059
Filed September 15, 2016

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Appeal from the Superior Court in Cochise County
No. CR201200536
The Honorable Wallace R. Hoggatt, Judge

**AFFIRMED**

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COUNSEL

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

Emily Danies, Tucson
*Counsel for Appellant*

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**MEMORANDUM DECISION**

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

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E S P I N O S A, Judge:

**¶1** After a jury trial in 2013, appellant Andrew Tree was convicted of first-degree burglary, two counts of aggravated assault with a deadly weapon, two counts of weapons misconduct, two counts of aggravated assault against a peace officer, two counts of theft, and false reporting. The trial court imposed presumptive, concurrent and consecutive terms of imprisonment totaling 21.25 years.

**¶2** On appeal, we affirmed Tree's convictions, but vacated his sentences on the weapons misconduct convictions, counts four and five, concluding the trial court had erred in ordering them served consecutively to his other sentences. *State v. Tree*, No. 2 CA-CR 2013-0374 (Ariz. App. July 14, 2014) (mem. decision). We directed the court to resentence Tree on those counts, stating "[w]hatever sentences the court imposes on counts four and five, they shall be served concurrently with the sentences for counts one, two, and three." We corrected two other sentences and affirmed the remaining ones. *Id.* ¶ 7.

**¶3** On remand, the trial court noted difficulty in following our direction because, although the sentences for counts one and two had originally been concurrent, it had ordered the sentence on count three to be served consecutively to those for counts one and two. It also noted that the 4.5 year terms on counts four and five would probably be concluded before the 7.5 year terms on counts one and two expired. After discussion with counsel, the court ordered the sentences on counts four and five to be served concurrently with counts one and two and the sentence on count

three to commence upon completion of counts one and two. The remaining counts would thus remain as originally ordered or follow completion of the sentence on count three. Tree agreed with the court's approach.

**¶4** On appeal, Tree "requests this Court clarify" our ruling on his first appeal. He specifically denies asking that we "take up the legal issue of whether count 3 ought to have run concurrently with counts one and two." Rather, he insists he "asks this Court to clarify its instructions in order to determine whether the sentencing court properly followed its directives."

**¶5** Tree, however, cites no authority for such a procedure. If clarification of our decision was necessary, that issue should have been presented in a motion for reconsideration within fifteen days after the filing of the decision. *See* Ariz. R. Crim. P. 31.18(b). The time for such a motion having run long ago, Tree can only challenge the sentences as re-imposed by the trial court. He agreed to those sentences, however, at a minimum forfeiting all but fundamental error review. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19–20, 115 P.3d 601, 607 (2005). And he not only fails to argue or establish fundamental error, he specifically denies making such a claim. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error waived on appeal if not argued). Nevertheless, we will not ignore fundamental error appearing in the record, but we see none here. *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007).

**¶6** Accordingly, the sentences imposed by the trial court are affirmed.