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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. JOSEPH DANIEL GARCIA, Appellant.	)	2 CA-CR 2010-0244 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20083180

Honorable Edgar B. Acuña, Judge

AFFIRMED

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B R A M M E R, Presiding Judge.

¶1 Joseph Garcia appeals from his convictions and sentences for negligent homicide, endangerment, and three counts of aggravated assault. Garcia asserts the trial court erred in permitting the admission of the results of blood sample analysis showing his blood alcohol concentration (BAC) "where no evidence was presented relating each blood draw to a specific result." He additionally contends the court erred by ordering that the probation term imposed for one of his three aggravated assault convictions be served consecutively to his prison terms, and by imposing presumptive sentences for the remaining aggravated assault convictions and his endangerment conviction. We affirm.

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On August 10, 2008, Garcia drove four people, M., W., J., and S., to a party, where he smoked marijuana and drank alcohol. At approximately 1:00 a.m., Garcia drove the group to another party taking place at a rest stop on Catalina Highway leading to Mount Lemmon where he smoked more marijuana. After leaving the party at approximately 4:00 a.m. with the same four passengers, Garcia attempted to pass another vehicle on the narrow, winding road, reaching a speed of approximately sixty-eight miles per hour, thirty-three miles per hour above the posted speed limit. He lost control of his vehicle, which hit a rock and rolled over. S. was killed, and W. and J. were injured. Garcia admitted having consumed alcohol and marijuana to investigating police. Four blood draws were performed, one each at 6:55 a.m., 8:45 a.m., 9:55 a.m., and 10:41 a.m. Tests of that blood showed BAC readings of .055, .033, .019, and less than .01. A criminalist estimated Garcia's BAC had been between .094 and .172 at 3:00 a.m., falling to between

.084 and .142 at 4:00 a.m. His blood also contained active marijuana (tetrahydrocannabinol) and marijuana metabolites (carboxy-tetrahydrocannabinol).

¶3 Garcia was charged with second-degree murder of S., two counts of aggravated assault with a deadly weapon or dangerous instrument of W. and J., two counts of aggravated assault causing serious physical injury to W. and J., endangerment of M., driving under the influence (DUI), and driving with alcohol in his body while under the age of twenty-one. Garcia pled guilty to the latter offense and, after a five-day trial, a jury convicted him of DUI, endangerment, three of the aggravated assault charges, and negligent homicide as a lesser-included offense of second-degree murder. The jury acquitted Garcia of aggravated assault causing serious physical injury to J. As to the state's allegation that the aggravated assaults, homicide, and endangerment charges were dangerous offenses, the jury found all of the offenses to be dangerous except for Garcia's conviction for aggravated assault causing serious physical injury to W.

¶4 The trial court sentenced Garcia to concurrent, presumptive prison terms, the longest of which are 7.5 years, for each felony conviction except Garcia's conviction of aggravated assault causing serious physical injury to W.[1] For that conviction, the court suspended the imposition of sentence and placed Garcia on a five-year term of probation to begin after he is released from prison. This appeal followed.

[1]The trial court sentenced Garcia to time served for his misdemeanor DUI conviction and his misdemeanor conviction for driving with alcohol in his body while under the age of twenty-one.

¶5 Garcia asserts the trial court erred in admitting BAC results derived from the four samples taken of his blood. Although each of the four samples was labeled, and a Pima County deputy sheriff testified about when the samples had been collected, the deputy did not specify which sample corresponded to which time. Thus, Garcia asserts, there was insufficient foundation to permit admission of the test results and the criminalist's estimation of Garcia's BAC near to the time of the accident. Although Garcia made a different foundation objection below, because he did not object on the basis he now argues, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to trial error forfeits appellate relief for all but fundamental, prejudicial error); *State v. Moody*, 208 Ariz. 424, ¶ 120, 94 P.3d 1119, 1150 (2004) (absent fundamental error, if evidence objected to on one ground in trial court, other grounds raised for first time on appeal waived); *State v. Kelly*, 122 Ariz. 495, 497, 595 P.2d 1040, 1042 (App. 1979) ("[R]aising one objection at trial does not preserve another objection on appeal.").

¶6 "A trial court's conclusion that evidence has an adequate foundation is reviewed for an abuse of discretion." *State v. McCray*, 218 Ariz. 252, ¶ 8, 183 P.3d 503, 507 (2008). The foundation for evidence is adequate if "the record contains sufficient evidence to support a jury finding that the offered evidence is what its proponent claims it to be." *State v. Lavers*, 168 Ariz. 376, 386, 814 P.2d 333, 343 (1991); *see also* Ariz. R. Evid. 901(a). We agree with the state that there was no error in admitting the test results. The criminalist testified his estimates of Garcia's BAC were based on the assumption Garcia had stopped drinking at approximately 1:00 a.m. Consistent with that assumption,

there was no evidence Garcia had consumed alcohol after leaving the first party.[2] And the criminalist testified alcohol is eliminated from the body over time—thereby reducing the BAC, and that the samples appeared to have been taken during the period alcohol was being eliminated from Garcia's body. Additionally, the four samples were labled "EV1" through "EV4," with the test results for EV1 showing a BAC of .055, EV2 .033, EV3 .019, and EV4 less than .01, further suggesting the samples were taken in sequence. Based on this evidence, the jury readily could conclude the highest BAC sample corresponded to the earliest blood draw, and that the falling BAC results corresponded with later blood draws.

¶7 Garcia additionally argues the trial court was not permitted to place him on probation consecutive to his prison terms. Garcia's probationary term was for his conviction of aggravated assault causing serious physical injury to W. Garcia asserts that, because that term is consecutive to his prison sentence for aggravated assault with a deadly weapon or dangerous instrument of W., it violates A.R.S. § 13-116 and double jeopardy because the two convictions were based on the same act. *See State v. Stock*, 220 Ariz. 507, ¶ 11, 207 P.3d 760, 762 (App. 2009) ("If a defendant's conduct constitutes a 'single act,' the court may not impose consecutive sentences."), *quoting State v. Hampton*, 213 Ariz. 167, ¶ 64, 140 P.3d 950, 965 (2006). But Garcia invited any error,

[2]Garcia asserts it is "speculation" to infer he did not drink at the second party. We find nothing speculative in reaching that inference because it is supported by the evidence—Garcia testified he had not consumed alcohol at the second party. In any event, even had Garcia consumed alcohol at the second party, nothing in the criminalist's testimony suggests his BAC would have been increasing at the time of his first blood draw, approximately three hours after the accident.

having proposed that the court place him on a consecutive probationary term. *See State v. Lucero*, 223 Ariz. 129, ¶ 17, 220 P.3d 249, 255 (App. 2009) (invited error doctrine "precludes a party who causes or initiates an error from profiting from the error on appeal"). Accordingly, we do not address this issue further.

¶8 Finally, Garcia asserts the trial court abused its discretion by imposing presumptive sentences for his aggravated assault and endangerment convictions.[3] The only aggravating factor presented to and found by the jury concerned Garcia's conviction for negligent homicide—the emotional harm to S.'s family. The court nonetheless stated at sentencing that it "ha[d] considered the other victims in this case and the physical harm [Garcia's conduct] caused . . . them . . . and the ongoing physical damage that may continue, psychological and emotional damage also." And it imposed presumptive sentences after "balancing the aggravating and mitigating factors." Garcia asserts the trial court erred by finding those aggravating factors because it was not the trier of fact. Thus, he reasons, because the court found the mitigating factors counterbalanced those factors, it therefore abused its discretion by imposing presumptive, rather than mitigated,

[3]Garcia did not raise this claim in the trial court. Because we find no error, we need not determine whether Garcia had an adequate opportunity to raise the claim below and therefore forfeited appellate relief absent fundamental, prejudicial error. *See State v. Vermuele*, No. 2 CA-CR 2009-0395, ¶¶ 6, 9, 2011 WL 776118 (Ariz. Ct. App. Mar. 4, 2011) (declining to apply fundamental error review when "defendant ha[d] no appropriate opportunity to preserve any objection to errors arising during court's imposition of sentence"); *see also State v. Herrera*, 203 Ariz. 131, ¶ 22, 51 P.3d 353, 359 (App. 2002) ("[B]efore we engage in fundamental error analysis, we must first find error.").

sentences because, in the absence of the aggravating factors, the court would have imposed mitigated prison terms.

¶9 As we understand Garcia's argument, he contends that, if the trier of fact does not first find an aggravating factor, A.R.S. § 13-702(D)[4] precludes a trial court from considering factors not found by the trier of fact in considering whether to impose a presumptive sentence. We disagree. That subsection states that, "[i]f the trier of fact finds at least one aggravating circumstance, the trial court may find by a preponderance of the evidence additional aggravating circumstances." § 13-702(D). But "trial courts may freely consider other sentencing factors not found by a jury in choosing a specific punishment that does not exceed the statutory maximum," in this case the presumptive term. *State v. Johnson*, 210 Ariz. 438, ¶¶ 10, 12, 111 P.3d 1038, 1041 (App. 2005). And the weight to be given any factor asserted in mitigation rests "within the sound discretion of the sentencing judge." *State v. Towery*, 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996).

¶10 Garcia has provided no basis for us to conclude § 13-702 limits that discretion; that statute prescribes the procedure for imposing an aggravated or mitigated sentence, it does not limit expressly or implicitly the factors a trial court may consider in determining whether to impose a presumptive term. *See* § 13-702(B) (explaining that "upper or lower [prison term] . . . may be imposed only if one or more of the

[4]The Arizona criminal sentencing code has been amended and renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120, effective "from and after December 31, 2008." *Id.* § 120. We refer in this decision to the sentencing statutes in force at the time of Garcia's offenses. *See* 2006 Ariz. Sess. Laws, ch. 148, § 1 (former § 13-702); *see also* 2008 Ariz. Sess. Laws, ch. 24, § 1 (former § 13-604; providing presumptive sentences for dangerous offenses).

circumstances alleged to be in aggravation of the crime are found to be true by the trier of fact beyond a reasonable doubt . . . , or [facts] in mitigation of the crime are found to be true by the court"); *cf. State v. Olmstead*, 213 Ariz. 534, ¶ 5, 145 P.3d 631, 632 (App. 2006) ("[E]ven when only mitigating factors are found, the presumptive term remains the presumptive term unless the court, in its discretion, determines that the amount and nature of the mitigating circumstances justifies a lesser term."). Accordingly, we find no error in the trial court's imposition of presumptive sentences.

¶11 For the reasons stated, we affirm Garcia's convictions and sentences.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

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