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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 4/16/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 12-0212  
)  
Appellee, ) DEPARTMENT A  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
CORLETHA SHERIE DAVIS, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-161441-001

The Honorable Dawn M. Bergin, Judge

**AFFIRMED; PRESENTENCE INCARCERATION CREDIT MODIFIED**

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**H O U S E R**, Judge

¶1 Corletha Sherie Davis appeals her conviction and sentence of second degree murder. For the following reasons, we affirm Davis's conviction and sentence but modify her

presentence incarceration credit to reflect the correct number of days to which Davis is entitled.

#### **FACTS AND PROCEDURAL BACKGROUND**

¶2 Davis was indicted on one count of second degree murder, a Class 1 felony, which the State alleged was dangerous "because the offense involved the discharge, use, or threatening exhibition of a handgun, a deadly weapon or dangerous instrument and/or the intentional or knowing infliction of serious physical injury." The evidence presented at Davis's jury trial showed that in the early morning of November 19, 2010, Davis walked to the QuikTrip ("QT") near her home.<sup>1</sup> She wore a red sweatshirt with the hood pulled over her head. Despite QT policy to the contrary, the store clerk permitted Davis to use the store telephone because Davis made him "uncomfortable." She called a cab company, gave a false name and waited for the cab to arrive.

¶3 The cab driver brought Davis to the northernmost driveway of her apartment complex, though Davis's unit was not accessible from that entrance. While still in the cab, Davis then allegedly shot the cab driver multiple times in his head and face. A driver observed the cab roll out of the driveway and stop in the middle of the road, and then saw a woman in a

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<sup>1</sup> We view the evidence in the light most favorable to sustaining the conviction and resolve all reasonable inferences against Davis. *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981).

red sweatshirt exit the passenger-side of the cab and walk toward the apartment complex. He called the police when the cab driver slumped out the driver-side door, "bleeding real badly."

¶4 Police detained Davis in her boyfriend's apartment next-door to her own. When they executed a search warrant on the boyfriend's apartment, officers found two plastic bags in the dishwasher containing clothes that matched the description of the clothing Davis was seen wearing at the QT, and two guns, a .22-caliber Ruger semi-automatic pistol and a .22 caliber revolver. Testing later matched blood stains on Davis's clothing to the cab driver's DNA. An autopsy also determined that the cab driver died from a minimum of five and maximum of seven bullet wounds from the .22-caliber Ruger pistol.

¶5 The court instructed the jury on the elements of second degree murder and also on the definition of a "dangerous offense." The court stated, "An offense is a dangerous offense if it involved the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." The jury returned a guilty verdict on the charge of second degree murder. The foreperson also marked an "x" for "dangerous" on the verdict form.

¶6 At Davis's sentencing hearing, the court noted that it could not impose any sentence greater than the presumptive

because the jury did not find any aggravating circumstances. The State argued that because second degree murder was not subject to the sentencing scheme for dangerous felonies in Arizona Revised Statutes ("A.R.S.") section 13-704 (West 2013), the court instead could use the jury's dangerous finding as an aggravating factor.<sup>2</sup> Davis argued she did not have notice of this possible aggravator. The court ruled Davis did have notice both from the allegations in the indictment and the definition of a dangerous offense given to the jury, and the court could therefore utilize the jury's dangerous finding as an aggravator.

¶17 Davis filed an objection, which the court treated as a motion for reconsideration, arguing that because the dangerous offense instruction was stated in the disjunctive, the court could not determine whether the jury unanimously found that the offense involved the use of a deadly weapon under § 13-701(D)(2) (West 2013) or the infliction of serious physical injury under § 13-701(D)(1). The court ruled that because the evidence established beyond a reasonable doubt that Davis shot the victim with a gun and the victim died from that injury, the court could lawfully aggravate Davis's sentence pursuant to § 13-701(D)(2). The court then imposed the maximum sentence of twenty-two years and awarded Davis 482 days of presentence incarceration credit.

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<sup>2</sup> Absent material revisions after the date of an alleged offense, we cite a statute's current version.

¶18 We have jurisdiction of Davis's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (West 2013), 13-4031 (West 2013), and 4033(A) (West 2013).

## DISCUSSION

### A. Standard of Review.

¶19 We review the superior court's sentencing decision for an abuse of discretion. *State v. Arbolida*, 206 Ariz. 306, 307, ¶ 5, 78 P.3d 275, 276 (App. 2003). An abuse of discretion is "an exercise of discretion which is manifestly unreasonable, exercised on untenable grounds or for untenable reasons." *Williams v. Williams*, 166 Ariz. 260, 265, 801 P.2d 495, 500 (App. 1990). Generally, a court abuses its discretion if it "commits an error of law in reaching the decision." *Files v. Bernal*, 200 Ariz. 64, 65, ¶ 2, 22 P.3d 57, 58 (App. 2001). Moreover, when an alleged error is based on a constitutional or legal issue, we review the issue *de novo*. *State v. Boggs*, 218 Ariz. 325, 334, ¶ 38, 185 P.3d 111, 120 (2008).

### B. The Superior Court Properly Imposed an Aggravated Sentence Because the Evidence Established Beyond a Reasonable Doubt that the Offense Involved the Use of a Deadly Weapon.

¶10 Davis argues that by using the jury's dangerous finding to aggravate her sentence, the superior court violated her constitutional right to a unanimous verdict because "[w]e do

not know, and we cannot know, how the jury reached [its] finding of dangerousness." Specifically, Davis contends "[i]t is plausible" that the jury based its verdict on an improper prong of the dangerous offense instruction.

¶11 In Arizona, the "presumptive sentence is the 'statutory maximum,'" unless the facts necessary to support an aggravated sentence have been found. *State v. Anderson (Anderson II)*, 211 Ariz. 59, 60, ¶ 3, 116 P.3d 1219, 1220 (2005). Any fact that increases the penalty for a crime beyond the presumptive term must be submitted to the jury and proved by the State beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Moreover, the jury must unanimously agree on such an aggravating factor. *State v. Anderson (Anderson I)*, 210 Ariz. 327, 355, ¶ 126, 111 P.3d 369, 397 (2005).

¶12 Here, Davis was convicted of second degree murder, a Class 1 felony with a presumptive term of imprisonment of sixteen years and a maximum term of twenty-two years. A.R.S. § 13-710(A) (2010). The court used the jury's dangerous finding to impose the maximum term. The definition of "dangerous offense" provided to the jury, however, included two distinct prongs: the offense involved either (1) the intentional or knowing infliction of serious physical injury, or (2) the

discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.

¶13 Davis argues and the State concedes that the court could not use the first "legally deficient prong" to aggravate Davis's sentence because serious physical injury is an essential element of second degree murder. See A.R.S. § 13-701(D)(1) (infliction of serious physical injury constitutes an aggravating circumstance "except if this circumstance is an essential element of the offense of conviction . . ."). The State maintains that the inclusion of that prong in the instruction to the jury was merely harmless error "because no reasonable jury could have failed to find that a deadly weapon was used in the commission of the offense." We agree with the State.

¶14 Similar arguments were raised in *Anderson I*. The appellant in *Anderson I* argued that because the "especially heinous, cruel or depraved" aggravator was stated in the disjunctive, he was denied the right to a unanimous jury finding of that factor. 210 Ariz. at 354, ¶ 119, 111 P.3d at 396. He contended that "some jurors could have found the murders especially cruel, while others found them especially heinous/depraved, without jury unanimity as to which prong satisfied" the aggravating factor. *Id.* Our supreme court refused to consider the jury's finding of this aggravator in

evaluating the appellant's sentence because the evidence was insufficient to establish that the murders were especially heinous or depraved, and it could not discern whether the jury's finding was based in whole or in part on that heinous/depraved prong. *Id.* at 355-56, ¶¶ 125, 130, 111 P.3d at 397-98.

¶15 Davis contends "[w]e are in the situation presented by *Anderson [I]*." But the court in *Anderson I* explained that the State can make a "compelling" argument that the jury need not agree which means satisfied the aggravator when there is sufficient evidence "to satisfy each alternative prong of an aggravating circumstance." *Id.* at 355, ¶ 128, 111 P.3d at 397. Only when the evidence is insufficient to support one or more of the alternative prongs does the situation presented in *Anderson I* or *State v. Lopez*, 158 Ariz. 258, 762 P.2d 545 (1988), also cited by Davis, apply.

¶16 "[A] violation of the Sixth Amendment's jury requirement with regard to sentencing factors may constitute harmless error if no reasonable jury would fail to find the factor's existence beyond a reasonable doubt." *State v. Miranda-Cabrera*, 209 Ariz. 220, 227, ¶ 30, 99 P.3d 35, 42 (App. 2004); see also *State v. Hampton*, 213 Ariz. 167, 183, ¶¶ 71-72, 140 P.3d 950, 966 (2006) (even absent a jury finding as to the existence of any aggravators, the court's imposition of an aggravated sentence is harmless error "if no reasonable jury, on



the basis of the evidence before it, could have failed to find the minimum number of aggravators necessary to expose the defendant to the sentence imposed"); *State v. Ring*, 204 Ariz. 534, 560, ¶ 79, 65 P.3d 915, 941 (2003) ("In those instances in which no reasonable jury could find that the [S]tate failed to prove [the aggravating factor] beyond a reasonable doubt, we will find harmless error affecting that factor."). Here, the evidence recounted above clearly demonstrated that Davis used a deadly weapon in committing the murder. The medical examiner's testimony also made clear that the victim was killed by multiple gunshot wounds. No reasonable jury could find the State failed to prove beyond a reasonable doubt that the offense involved the use of a deadly weapon, the proper prong of the dangerous offense instruction submitted to the jury. We therefore affirm the superior court's application of the jury's dangerous finding to aggravate Davis's sentence pursuant to A.R.S. § 701(D)(2).

**C. Davis Is Entitled to 483 Days of Presentence Incarceration Credit.**

¶17 Davis was taken into custody for the second degree murder charge on November 19, 2010 and sentenced on March 16, 2012. She was therefore entitled to 483 days of presentence incarceration credit; however, the superior court awarded her only 482 days, and the State concedes Davis is entitled to the additional day. See A.R.S. § 13-712(B) (West 2013) (defendant

entitled to credit for all time spent in custody pursuant to an offense until the defendant is sentenced to imprisonment for such offense). Thus, Davis's sentence shall be modified to reflect 483 days of presentence incarceration credit.

**CONCLUSION**

¶18 For the foregoing reasons, we affirm Davis's conviction and sentence but modify her presentence incarceration credit to reflect 483 days.

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ROBERT C. HOUSER, Judge Pro Tempore\*

CONCURRING:

/S/

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PATRICIA A. OROZCO, Presiding Judge

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PETER B. SWANN, Judge

\*The Honorable Robert C. Houser, Judge (Retired) of the Maricopa County Superior Court, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to Article 6, Section 3, of the Arizona Constitution and A.R.S. §§ 12-145 to -147 (2003).