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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

EDGUARDO ALEX MARTINEZ, *Appellant*.

No. 1 CA-CR 15-0370
FILED 5-3-2016

Appeal from the Superior Court in Maricopa County
No. CR2014-128020-001
The Honorable Dean M. Fink, Judge

CONVICTION AFFIRMED; REMANDED FOR RESENTENCING

COUNSEL

Arizona Attorney General's Office, Phoenix
By Craig W. Soland
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Peter C. Rosales
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Donn Kessler delivered the decision of the Court, in which Judge Andrew W. Gould and Judge Patricia K. Norris joined.

K E S S L E R, Judge:

¶1 Appellant Edgardo Alex Martinez (“Martinez”) was convicted of two counts of armed robbery, class two felonies; two counts of kidnapping, class two felonies; one count of first degree burglary, a class two felony; and false reporting to a law enforcement agency, a class one misdemeanor. Martinez was sentenced to two consecutive fifteen-year terms for each kidnapping count, to run concurrent with fifteen-year terms for each armed robbery conviction, a fifteen-year term for first degree burglary, and a six-month term for false reporting to a law enforcement agency. Counsel for Martinez filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530 (App. 1999). Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error. Martinez submitted a supplemental brief *in propria persona*, raising the following issues: (1) the burglary, kidnapping and robbery constituted a single act; and (2) the imposition of consecutive sentences for conduct arising under a single act violates Arizona Revised Statute (“A.R.S.”) section 13-116 (2010).¹ Counsel for Martinez asserted he found no arguable question of law that is not frivolous on the record. In addition, pursuant to *Penson v. Ohio*, 488 U.S. 75 (1988) and in response to our order, the parties submitted supplemental briefs on whether the matter had to be remanded for resentencing pursuant to *State v. Trujillo*, 227 Ariz. 314, 318-19, ¶¶ 17-21 (App. 2011). For the reasons that follow, we affirm Martinez’s convictions, but remand the matter to the superior court for resentencing.

FACTUAL AND PROCEDURAL HISTORY

¶2 Martinez was indicted for two counts of armed robbery under A.R.S. §§ 13-1902(A), 13-1904(A) (2010); two counts of kidnapping under A.R.S. § 13-1304(A)(3) (2010); one count of first degree burglary under A.R.S. §§ 13-1507(A), 13-1508(A) (2010); and one count of false reporting to

¹ We refer to the current versions of any statutes unless there were material changes to the statutes since the conviction and sentence in this case.

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a law enforcement agency under A.R.S. § 13-2907.01 (2010), all to which he pled not guilty.² At trial, the State presented testimony consisting of both victims' testimony and the testimony of ten Tempe police officers.

¶3 In the early morning of June 9, 2014, Martinez and his accomplice, Robert Villa ("Villa") (collectively "the defendants"), forced their way into the Tempe apartment of couple S.S. and D.T (collectively "the victims"), while both victims were home. The defendants were both armed, forced both victims onto the ground, and demanded an account of the victims' property. Martinez held the victims hostage at gunpoint for about three hours in their master bedroom while his accomplice removed property from their apartment.³

¶4 Just before the break-in, D.T. was playing an online video game while her actions were simultaneously captured with a web camera and broadcast (or live-streamed) over the internet. Shortly after the defendants broke in to the apartment, Villa passed the line of view of the webcam in the computer room. Because D.T. was actively live-streaming, Villa's image was broadcast online. A person with whom D.T. was playing saw the video feed of D.T. abruptly getting out of her chair and then observed an armed man dressed in black come into view behind her chair. The fellow gamer contacted another gamer who lived in Tempe, who ultimately contacted the Tempe police department.

¶5 The State presented testimony from three Tempe police officers who arrived at the apartment while the crime was still in progress. They testified that Martinez fled the scene but they ultimately tracked him down and arrested him. Martinez was unmasked during the crime, and both victims affirmatively identified Martinez once he was apprehended.

¶6 The jury found Martinez guilty of two counts of armed robbery, two counts of kidnapping, first degree burglary, and one count of false reporting to law enforcement. At the aggravation hearing, the jury found the presence of thirteen aggravators, including (1) a threatened infliction of serious physical injury, and (2) the use of a dangerous weapon. Relying in part on the threatened infliction of serious physical injury and the use of a dangerous weapon aggravating factors, the court sentenced

² Martinez was also indicted for one count of misconduct involving weapons, but the trial court dismissed the charge without prejudice, at the State's request, after Martinez was found guilty of the other charges.

³ S.S. told the defendants he had \$20,000 in a bank account and the defendants made plans to have S.S. get the money out of the account for them.

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Martinez to aggravated sentences of fifteen years' imprisonment for the first degree burglary conviction, fifteen years' imprisonment for each kidnapping conviction, and fifteen years' imprisonment for each armed robbery conviction.

¶7 Martinez filed a timely appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1) (2010).

STANDARD OF REVIEW

¶8 In an *Anders* appeal, this Court must review the entire record for fundamental error. *See State v. Banicki*, 188 Ariz. 114, 117 (App. 1997). Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, or is an error of such magnitude that the defendant could not possibly have had a fair trial. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005). We will only reverse if the error prejudiced the defendant. *Id.* at ¶ 20.

DISCUSSION

¶9 After careful review of the record, we find no grounds for reversal of Martinez's convictions. The record reflects Martinez had a fair trial and all proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. Martinez was present and represented by counsel at all critical stages of trial and was given the opportunity to speak at sentencing. However, as discussed below, we remand the matter to the superior court for resentencing.

I. There is sufficient evidence to support Martinez's convictions.

¶10 In reviewing the sufficiency of evidence at trial, "[w]e construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12 (1998). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25 (1976)).

¶11 Armed robbery requires proof that "in the course of taking any property of another from his person or immediate presence and against his will, [the defendant] threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property," while armed with a deadly weapon, or using or threatening to use a deadly weapon. A.R.S. §§ 13-1902(A), 13-1904(A)(1), (2). Kidnapping, as charged to the jury, requires proof that the defendant knowingly restrained another person with the intent to "[i]nflict

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death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony" A.R.S. § 13-1304(A)(3).

¶12 Both victims testified that Martinez and his accomplice stole their property, including their guns, electronics, luggage, jewelry, cell phones, wallets, IDs, credit cards, and credit card pin numbers. Martinez held the victims at gunpoint and threatened the victims he would kill them while his accomplice removed items from the apartment. The evidence is sufficient to support the convictions for both armed robbery and kidnapping.

¶13 First degree burglary requires proof that the defendant or an accomplice "enter[ed] or remain[ed] unlawfully in or on a residential structure with the intent to commit any theft or any felony therein," and "knowingly possesses explosives, a deadly weapon or a dangerous instrument in the course of committing any theft or any felony." A.R.S. §§ 13-1507(A), 13-1508(A).

¶14 The evidence is sufficient to support the burglary conviction. The victims testified that Martinez forced his way into their apartment by breaking down their front door. Martinez came in to the apartment with a gun pointed at the victims, held the victims at gunpoint in the master bedroom, and remained in the victims' apartment for around three hours. Martinez and his accomplice stole the victims' guns, electronics, luggage, jewelry, wallets, credit cards, IDs, cell phones, and credit card pin numbers from their apartment.

¶15 False reporting to a law enforcement requires proof that the defendant made "a false, fraudulent or unfounded report or statement or [] knowingly misrepresent[ed] a fact for the purpose of interfering with the orderly operation of a law enforcement agency" A.R.S. § 13-2907.01 (A).

¶16 Here, Tempe police officers testified that Martinez gave them a false name of "Ruben Santos," and a false birthday of February 3, 1993, after he was arrested. The evidence is sufficient to support the conviction.

II. The superior court did not err in imposing consecutive sentences for the two kidnapping convictions.

¶17 The superior court imposed consecutive sentences for the two kidnapping convictions because there were two separate victims. The court

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imposed concurrent sentences for the remaining convictions, and held each kidnapping sentence would run concurrent with the remaining sentences.⁴

¶18 Martinez contends that the imposition of consecutive sentences arising from his single act violates Arizona's double jeopardy statute, and the kidnapping sentences should have been imposed concurrently. "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." A.R.S. § 13-116. Because each kidnapping conviction involved different individuals, A.R.S. § 13-116 is not implicated. See *State v. Riley*, 196 Ariz. 40, 47, ¶ 21 (App. 1999) (holding that A.R.S. § 13-116 does not apply to sentences imposed for a single criminal act involving multiple victims); *State v. White*, 160 Ariz. 377, 380-81 (App. 1989) (consecutive sentences upheld when a single criminal act harmed multiple victims); see also *State v. Gunter*, 132 Ariz. 64, 69-70 (App. 1982) (holding that a single act for purposes of double jeopardy is defined by result of the act, not the act itself). Accordingly, and because the sentences imposed were within the statutory limits, the superior court did not err in sentencing Martinez to consecutive terms.

III. Resentencing is required.

¶19 The jury found the following thirteen aggravating factors beyond a reasonable doubt for both victims: (1) threatened infliction of serious physical injury; (2) use of a deadly weapon (a handgun); (3) taking of or damage to property in an amount sufficient to be an aggravating circumstance; (4) presence of an accomplice; (5) pecuniary gain; (6) harm to the victim; (7) multiple victims; (8) brutal, vicious, or violent manner; (9) reckless handling of a gun; (10) evading police; (11) leaving the scene of the crime; (12) attempting to cover up the crime; and (13) dangerous offense. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, 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.").

¶20 At sentencing, the trial court imposed an aggravated sentence relying in part on the following aggravators found by the jury: (1) the crime involved a threatened infliction of serious physical injury; and (2) the crime involved the use, threatened use, or possession of a deadly weapon. As to

⁴ Because Martinez was given 346 days of presentence incarceration, the six month sentence for false reporting to a law enforcement officer was "terminally disposed".

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first-degree burglary, the court instructed that to convict, the jury had to find that Martinez knowingly possessed a deadly weapon or a dangerous instrument. As to armed robbery, the court instructed the jury that an essential element was the use or threatened use of a deadly weapon. As to kidnapping, the court charged the jury with the element of whether Martinez acted with intent to “[i]nflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony” See A.R.S. § 13-1304(A)(3) (stating this element for kidnapping). See *supra* ¶¶ 11, 13. However, a court may not impose an aggravated sentence based on either the threatened infliction of serious physical injury or the possession, use of or threatened use of a deadly weapon if the circumstance is also “an essential element of the offense” A.R.S. § 13-701(D)(1), (2) (Supp. 2015). Thus, the court’s consideration of use, threatened use or possession of a deadly weapon to aggravate the sentences for armed robbery and first-degree burglary was erroneous. Since the jury also was charged with finding the element of intention to kill the victims, the court erred in considering the aggravator of threatened infliction of serious injury, interpreting death to be a serious injury.

¶21 In its supplemental *Person* brief, the State contends that the superior court would have erred in sentencing if it considered the circumstances of threatened infliction of serious physical injury or the use of a deadly weapon after those factors had already been used to enhance the sentencing under A.R.S. § 13-704 or in sentencing Martinez for armed robbery. However, that is not how A.R.S. § 13-701(D)(1), (2) read. Use of the facts listed in those two statutes to aggravate a sentence is prohibited if the factor is an essential element of the offense “or” has been used to enhance the range of the sentence. Thus, use of the factor is prohibited if it is an essential element of the offense regardless of whether it was used to enhance the sentence. *State v. Pinto*, 179 Ariz. 593, 596 (App. 1994) (holding that use of the word “or” in a statute is in the disjunctive, meaning an alternative or to give a choice of one among two or more things) (citations omitted). The State speculates the superior court likely used the circumstances to enhance the range of Martinez’s sentences to “dangerous” under A.R.S. § 13-704, and then considered the remaining factors found by the jury to aggravate the sentences. We find no support in the record supporting the State’s argument.

¶22 The imposition of an aggravated sentence based in part on consideration of a prohibited aggravating factor constitutes fundamental error. *Trujillo*, 227 Ariz. at 318, ¶ 15. When that occurs, we will remand for resentencing “when we cannot be certain that [the trial court] would have imposed the same sentence absent that factor” *State v. Munninger*, 213 Ariz. 393, 396, ¶ 9 (App. 2006) (internal quotation marks and citation

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omitted). Moreover, we will find prejudice if, after a review of the record, appellant shows the court could have reasonably imposed a lighter sentence had it not improperly considered the prohibited factor, that is, if the record indicates that the improper factor influenced the sentencing decision. *Trujillo*, 227 Ariz. at 318–19, ¶¶ 16, 21.

¶23 Here, the trial court balanced a number of aggravators against a few mitigators to impose an aggravated sentence. On this record, we cannot be certain the superior court would have imposed the same sentence absent the prohibited aggravators and the appellant has shown prejudice. *Cf. Munninger*, 213 Ariz. at 397, ¶¶ 12, 14 (determining no fundamental error or prejudice when the judge expressly found that each of the aggravating factors alone would have outweighed the mitigating factors). Accordingly, we remand for resentencing on the convictions for armed robbery, first-degree burglary and kidnapping without the two aggravating factors to the extent they are essential elements in those three crimes as charged and thus prohibited under A.R.S. § 13-701(D)(1), (2).

CONCLUSION

¶24 After careful review of the record, we affirm Martinez’s convictions. However, for the reasons stated above, we remand this matter to the superior court for resentencing. Insofar as Martinez’s convictions are concerned, defense counsel has no further obligations unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). Martinez shall have thirty days from the date of this decision to proceed, if he so desires, with a *pro per* motion for reconsideration or petition for review based upon our affirmance of his convictions for armed robbery, burglary, kidnapping, and false reporting to law enforcement.



Ruth A. Willingham · Clerk of the Court
FILED : ama