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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

ERIC JESUS GONZALEZ, *Appellant*.

No. 1 CA-CR 16-0024
FILED 1-31-2017

Appeal from the Superior Court in Maricopa County
No. CR2014-158333-001
The Honorable Michael W. Kemp, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Gracynthia Claw
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Joel M. Glynn
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge Jon W. Thompson joined.

H O W E, Judge:

¶1 Eric Jesus Gonzalez appeals his sentences for armed robbery. He argues that the trial court erred by wrongfully considering the use of a weapon as an aggravating factor. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Late one evening in October 2014, Gonzalez and a friend approached an occupied car parked in an apartment complex's parking lot. The two then forced the car's occupants out at gunpoint and demanded that they hand over their money, a cell phone, a wallet, and the car keys. Gonzalez and the friend then fled in the stolen car. After leaving the apartment complex, Gonzalez drove to a nearby convenience store, stole four cases of beer, and then crashed the stolen car into a stop sign. After receiving anonymous tips several weeks later that Gonzalez may have been involved, Phoenix Police arrested and interviewed him. The State subsequently charged Gonzalez with two counts of armed robbery for stealing the car from its driver and passenger, respectively, and one count of shoplifting for stealing the cases of beer.

¶3 Before Gonzalez's jury trial, the State alleged several aggravating circumstances for the two counts of armed robbery. These factors included – among others – the use, threatened use, or possession of a deadly weapon (firearm) during the commission of the crimes. The State further alleged that Gonzalez had several historical prior offenses that could be used to aggravate his sentence if convicted.

¶4 Gonzalez's case proceeded to a five-day trial. After the State rested its case-in-chief, it stated that it intended to prove the alleged aggravating factors if the jury found Gonzalez guilty of any of the crimes and would therefore require a hearing. The State told the trial court, however, that it did not think it could use the use of a firearm as an aggravating factor because the use of a firearm is encompassed in the

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charged armed robbery offenses. The parties and the trial court agreed to resolve the issue at a later time.

¶5 Upon deliberation, the jury ultimately convicted Gonzalez of all three counts. The trial court then instructed the jury that it must conduct an aggravating factor hearing regarding Gonzalez's sentence based on the State's alleged aggravating circumstances. But before the hearing, out of the jury's presence, the trial court stated that it was still unsure whether the aggravating factor of use of a weapon could be used for the armed robbery charges, "out of an abundance of caution" it would add that factor to the instructions for the jury's consideration. Neither the State nor Gonzalez objected to the court's decision.

¶6 At the hearing, the State argued that it proved five aggravating factors during trial beyond a reasonable doubt regarding the two counts of armed robbery. Specifically, the State alleged that it proved that (1) the offenses involved the infliction or threatened infliction of serious injury, (2) the offenses involved the presence of an accomplice, (3) the defendant committed the offenses for pecuniary gain, (4) the offenses caused physical, emotional, or financial harm to the victims, and (5) the offenses involved the use, threatened use, or possession of a firearm. Conversely, Gonzalez argued that the State failed to prove each of the aggravating factors, including the use of a firearm. The jury deliberated and found that the State had proved all five aggravating factors relating to the first count, and all but the first aggravating factor for the second count.

¶7 At the sentencing hearing, Gonzalez and his mother testified regarding Gonzalez's tough childhood, which the trial court accepted to mitigate his sentence. However, the trial court noted that the existence of several aggravating factors outweighed the mitigating one. These aggravating factors included the prior felony convictions, that "a weapon was used in this matter," that Gonzalez had more than one victim, and that Gonzalez committed the crimes for pecuniary gain. "Taking all of that into account," in addition to the nature of the crimes themselves, the trial court then sentenced Gonzalez to aggravated and concurrent terms of 20-years' imprisonment for the two armed robbery convictions with 395 days' presentence incarceration, and 6-months' incarceration for the shoplifting conviction with 180 days' presentence incarceration. Gonzalez timely appealed.

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DISCUSSION

¶8 Gonzalez argues that the trial court improperly double-counted the use of a deadly weapon to aggravate both of his armed robbery convictions because the weapon was an essential element of the crimes. Generally, we review the trial court's sentencing order for an abuse of discretion. *State v. Jenkins*, 193 Ariz. 115, 121 ¶ 25, 970 P.2d 947, 953 (App. 1998). However, Gonzalez did not object to the trial court's computation of his sentence, so we review for fundamental error only. *See State v. Carlson*, 237 Ariz. 381, 400 ¶ 78, 351 P.3d 1079, 1098 (2015). To prevail under review for fundamental error, Gonzalez must establish that fundamental error exists and that the error caused him prejudice. *State v. Henderson*, 210 Ariz. 561, 567 ¶ 20, 115 P.3d 601, 607 (2005). Error is fundamental when it goes "to the foundation of the case" or is "of such magnitude that the defendant could not have received a fair trial." *Id.* at 567 ¶ 19, 115 P.3d at 607. Imposition of an illegal sentence constitutes fundamental error. *State v. Martinez*, 226 Ariz. 221, 224 ¶ 17, 245 P.3d 906, 909 (App. 2011). To establish that the use of an improper aggravating factor caused him prejudice, a defendant must show that the trial court likely would have reached a different result had it not considered that factor. *See Henderson*, 210 Ariz. at 568-69 ¶¶ 26-27, 115 P.3d 608-09. Because Gonzalez's aggravated sentences were supported by several proper aggravating factors, the trial court did not fundamentally err.

¶9 In Arizona, a trial court must consider the "use, threatened use or possession of a deadly weapon or dangerous instrument during the commission of a crime" as a factor to aggravate a criminal sentence. A.R.S. § 13-701(D)(2). However, a court may not consider this factor "if this circumstance is an essential element of the offense of conviction" or has been used to enhance the range of punishment. *Id.* As relevant here, armed robbery is a class 2 felony which occurs if, "in the course of committing robbery," a person "is armed with a deadly weapon or a simulated deadly weapon" or "uses or threatens to use a deadly weapon or dangerous instrument." A.R.S. § 13-1904(A)(1), (2). Also as relevant here, dangerous and repetitive class 2 felonies are punishable by a minimum of 15.75 years' imprisonment and a maximum of 28 years' imprisonment. A.R.S. § 13-704(F)(2).

¶10 Here, the "use or threatened use of a deadly weapon" is an essential element to both of Gonzalez's armed robbery offenses. Thus, A.R.S. § 13-701(D)(2) prohibits the trial court from considering the use of a firearm to aggravate the sentence. Because the trial court did consider this factor in imposing its sentence, it erred. The State concedes this point. But a

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trial court's consideration of an improper aggravating factor is not always fundamental error. *State v. Munninger*, 213 Ariz. 393, 397 ¶¶ 11-12, 142 P.3d 701, 705 (App. 2006).

¶11 Because the trial court imposed a sentence within the statutory range, the sentence is not illegal and the court's error was not fundamental. Before Gonzalez's jury trial, the State alleged several aggravating factors for both of the armed robbery charges. The State affirmed after resting its case-in-chief that it intended to pursue, and subsequently did pursue, five alleged factors at the aggravation hearing upon Gonzalez's convictions. The jury then found that the State had proved beyond a reasonable doubt that Gonzalez had an accomplice, committed the crimes for pecuniary gain, used a deadly weapon, and caused physical, emotional, or financial harm to the victim. Regarding the first count of armed robbery, the jury also found that the State proved that the offense involved the infliction or threatened infliction of serious physical injury. Additionally, the trial court found that the State proved the existence of two prior felony convictions, which were further reasons to aggravate Gonzalez's sentence.

¶12 Although the trial court erred by considering the use of a deadly weapon, four remaining aggravating factors properly applied to the first count and three remaining aggravating factors properly applied to the second count. Each of these remaining factors exposed Gonzalez to aggravated sentences. *See State v. Martinez*, 210 Ariz. 578, 584 ¶ 21, 115 P.3d 618, 624 (2005) ("Under Arizona's sentencing scheme, once a jury . . . explicitly finds one aggravating factor, a defendant is exposed to a sentencing range that extends to the maximum punishment available"). Further, Gonzalez's sentences were within the aggravated sentencing range prescribed by A.R.S. § 13-704(F)(2) as a dangerous and repetitive class 2 felony. Thus, the court's error was not fundamental.

¶13 Even if the trial court's consideration of the use of a deadly weapon as an aggravating factor was fundamental error, Gonzalez has nevertheless failed to prove that it prejudiced him. The trial court stated at the sentencing hearing that it considered each of the factors in aggravating Gonzalez's sentences, and that the combined weight of the aggravating factors outweighed the sole mitigating factor of Gonzalez's difficult childhood. Although the court did not specify how much weight it gave to each of the aggravating factors, the trial court would have imposed the same sentence because the combined weight of the five remaining aggravating factors still outweigh the sole and weaker mitigating factor. *See, e.g., State v. Hoskins*, 199 Ariz. 127, 152 ¶ 112, 14 P.3d 997, 1022 (2000)

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(“Nevertheless, while the trial judge correctly found the defendant’s difficult childhood was proved, the evidence of causal nexus is weak to non-existent.”). Thus, Gonzalez’s argument that the trial court would have imposed a lesser sentence after weighing only the proper factors is mere speculation insufficient to establish prejudice. *See State v. Trujillo*, 227 Ariz. 314, 318-19 ¶ 17, 257 P.3d 1194, 1198-99 (App. 2011) (stating that speculation alone does not show prejudice). Accordingly, the record supports Gonzalez’s sentences.

CONCLUSION

¶14 For the foregoing reasons, we affirm.



AMY M. WOOD • Clerk of the Court
FILED: AA