IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JASON ROBERT ZUCHOWSKI, *Appellant*.

No. 1 CA-CR 16-0913
FILED 12-19-2017

Appeal from the Superior Court in Maricopa County
No. CR2015-104416-001
The Honorable Mark H. Brain, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jana Zinman
Counsel for Appellee

Maricopa County Legal Advocate's Office, Phoenix
By Colin F. Stearns
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Judge Jennifer B. Campbell joined.

T H U M M A, Chief Judge:

¶1 Defendant Jason Robert Zuchowski claims he was improperly sentenced, following a trial, as a category two repetitive offender for four convictions of public sexual indecency to a minor because the State failed to provide adequate notice. Because Zuchowski has shown no reversible error, his sentences are affirmed.

FACTS[1] AND PROCEDURAL HISTORY

¶2 In 2008, Zuchowski was placed on probation for ten years for two convictions of attempted public sexual indecency to a minor, each Class 6 undesignated felonies. In early 2015, Zuchowski was indicted for various offenses alleged to have occurred on two dates: (a) on December 12, 2014, two counts of public sexual indecency, Class 1 misdemeanors, (Counts 1 and 2) and one count of public sexual indecency to a minor, a Class 5 felony (Count 3) and (b) on December 18, 2014, four counts of public sexual indecency to a minor, Class 5 felonies (Counts 4-7).

¶3 In March 2015, along with alleging various aggravating circumstances, the State made filings alleging Zuchowski was on probation at the time of the charged offenses and Zuchowski's 2008 convictions were "multiple offense[s] not committed on the same occasion and . . . not a historical prior felony conviction," adding that if convicted of the charged offenses, Zuchowski "shall be sentenced pursuant to A.R.S. § 13-702.02." In fact, however, effective January 1, 2009, A.R.S. § 13-702.02 (2008) was amended and, in substance as applicable here, renumbered A.R.S. § 13-703

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[1] On appeal, this court views the evidence in the light most favorable to sustaining the conviction and resolves all reasonable inferences against the defendant. *State v. Karr*, 221 Ariz. 319, 320 ¶ 2 (App. 2008).

(2014). *See State v. Hausner*, 230 Ariz. 60, 88 ¶ 133 (2012).[2] The State's error in citing to the prior version of this statute is the basis for Zuchowski's appeal.

¶4 In February 2017, after a seven-day trial, the jury found Zuchowski guilty as charged. The jury also found the State proved four aggravating circumstances for each felony conviction: (1) harm to multiple victims; (2) the victim was of a young age; (3) Zuchowski had a prior conviction for a similar offense and (4) Zuchowski was on probation for a felony offense at the time of the offenses.

¶5 In presentence memoranda, the State and Zuchowski addressed the proper sentence for the felony convictions. The State argued, pursuant to A.R.S. § 13-703(B), that given his 2008 conviction, Zuchowski should be sentenced as a category one repetitive offender for Count 3 (committed on December 12, 2014) and a category two repetitive offender for Counts 4-7 (committed on December 18, 2014). Zuchowski argued, pursuant to A.R.S. § 13-703(A), that he should be sentenced as a category one repetitive offender on Counts 3-7 because "there were only two dates of the offense—12/12/2014 and 12/18/2014 . . . not a third or subsequent date." Pre-sentencing, Zuchowski did not claim inadequate notice but argued, instead, that "[t]he State's interpretation of A.R.S. § 13-703(A) is incorrect."

¶6 At sentencing, the superior court agreed with the State. Given Zuchowski was on probation at the time of the offenses, he could be sentenced to no less than the presumptive prison terms. *See* A.R.S. § 13-708. Accordingly, the court sentenced Zuchowski as a category one repetitive offender on Count 3 (imposing a 1.5 year presumptive prison term, with concurrent jail terms for Counts 1 and 2) and as a category two repetitive offender on Counts 4-7 (imposing 2.25 year presumptive prison terms, concurrent with each other but consecutive to Counts 1-3).

¶7 This court has jurisdiction over Zuchowski's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031 and 13-4033(A)(1).

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[2] Although not an issue here, the State's allegation claimed the 2008 conviction was for public sexual indecency-sexual contact with a minor present, a Class 5 felony, when the actual convictions were for attempted public sexual indecency to a minor, Class 6 undesignated felonies.

DISCUSSION

¶8 Zuchowski argues the superior court erred when it sentenced him as a category two repetitive offender for his convictions on Counts 4-7 when the State's allegation incorrectly cited A.R.S. § 13-702.02, rather than A.R.S. § 13-703, and, in particular, A.R.S. § 13-703(B)(1).

¶9 Under A.R.S. § 13-702.02(A),

> A person who is convicted of two or more felony offenses that were not committed on the same occasion but that either are consolidated for trial purposes or are not historical prior felony convictions . . . shall be sentenced, for the second or subsequent offense, pursuant to this section.

This statute specified a presumptive prison term of 1.5 years for the "second nondangerous [Class 5] felony offense," A.R.S. § 13-702.02(B)(3), and a presumptive prison term of 2.25 years for "any nondangerous felony offense subsequent to the second felony offense," A.R.S. § 13-702.02(B)(4).

¶10 At the time of Zuchowski's December 2014 offenses, the potentially relevant portion of the sentencing enhancement statute reads as follows:

> A person shall be sentenced as a category one repetitive offender if the person is convicted of two felony offenses that were not committed on the same occasion but that either are consolidated for trial purposes or are not historical prior felony convictions.
>
> . . .
>
> A person shall be sentenced as a category two repetitive offender if the person . . . [i]s convicted of three or more felony offenses that were not committed on the same occasion but that either are consolidated for trial purposes or are not historical prior felony convictions.

A.R.S. § 13-703(A), (B)(1). As with prior law, the presumptive sentence for a category one repetitive Class 5 felony offense is 1.5 years in prison, A.R.S.

§ 13-703(H), and the presumptive sentence for a category two repetitive Class 5 felony offense is 2.25 years in prison, A.R.S. § 13-703(I).[3]

¶11 With this background, Zuchowski argues on appeal "due process requires that the State give pre-trial notice of its intent to enhance a defendant's sentence pursuant to § 13-703(A) or (B)," and that "[t]he error in this matter is fundamental because the State's failure to give proper notice of its intent to enhance [Zuchowski's] sentence pursuant to § 13-703(B)(1) denied [him] due process." Zuchowski did not raise this argument with the superior court, meaning this court's review is for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567 ¶ 19 (2005). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* (quoting *State v. Hunter*, 142 Ariz. 88, 90 (1984)). Accordingly, Zuchowski "bears the burden to establish that (1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice." *State v. James*, 231 Ariz. 490, 493 ¶ 11 (App. 2013) (citations and quotations omitted). On this record, Zuchowski has failed to show fundamental error resulting in prejudice for at least three reasons.

[3] Given that he committed the 2014 felony offenses while on probation, Zuchowski concedes he was not eligible for a sentence less than the presumptive term. *See* A.R.S. § 13-708. Moreover, notwithstanding the jury finding various aggravating circumstances, the superior court sentenced Zuchowski to presumptive prison terms for the 2014 felony offenses. Accordingly, although the sentencing ranges under pre-2009 law and 2014 law differed (with the current ranges allowing a longer prison term), *compare* A.R.S. § 13-702.02(B)(3), (B)(4) *with* A.R.S. § 13-703(H), (I), those differences are not at issue here.

¶12 First, Zuchowski's argument is premised on a right to pretrial notice of the possibility of sentence enhancements. Although Zuchowski cites *State v. Waggoner*, 144 Ariz. 237, 239 (1985) for that proposition, as noted more recently, the Arizona Supreme Court "has never held that the state must provide pretrial notice of its intent to seek enhanced sentences under [A.R.S. § 13-702.02]." *Hausner*, 230 Ariz. at 88 ¶ 135. Accordingly, the basic premise of Zuchowski's argument is uncertain.[4]

¶13 Second, although conceding "a liberal reading of" the State's notice "would probably put a defendant on notice of the State's intent" to seek a category one repetitive offender sentence under A.R.S. § 13-703(A), Zuchowski argues nothing gave him "notice that the State intended to have appellant's sentences enhanced pursuant to § 13-703(B)(1)," governing category two repetitive offenders. Zuchowski, however, provides no legal authority supporting this argument and the record is to the contrary. The indictment charged Zuchowski with "two felony offenses that were not committed on the same occasion" that, given there was no severance, were "consolidated for trial purposes." A.R.S. § 13-703(A). Indeed, Zuchowski's presentence memorandum conceded the 2014 offenses involved two offense dates, with "one felony from the first date and four felonies from the second date."

¶14 Zuchowski offers no explanation for why, in alleging his 2008 conviction as grounds for an enhanced sentence, the State would have been required to argue that he was a category one (as opposed to category two) repetitive offender under A.R.S. § 13-703(A), or an "offense subsequent to the second felony offense" under A.R.S. § 13-702.02(B)(4). Nor is such an explanation presented in the record. The indictment alleged that the charges resulting in this appeal were committed on two different dates, and the State's allegation asserted that the 2008 offense was committed on a third date. Thus, the State's allegation, at least minimally, put him on notice that it would seek sentencing based on his commission of at least three felony offenses committed on three different dates.

[4] To the extent that Zuchowski argues that he was entitled to pretrial notice of the State's intent to seek an enhanced sentence specifically "pursuant to A.R.S § 13-703(B)(1)," as opposed to a more general citation to A.R.S. § 13-703, he cites no authority requiring such specificity.

¶15 Finally, and perhaps most significantly, Zuchowski has not asserted or shown any prejudice resulting from the State's error in citing to A.R.S. § 13-702.02 instead of § 13-703. For this additional reason, he has failed to show fundamental error resulting in prejudice. *See Hausner*, 230 Ariz. at 88 ¶ 137 ("The State indicated in its pretrial filings that it might seek enhanced sentences under A.R.S. § 13–702.02, and [defendant] has not shown any prejudice from the lack of more specific notice."); *James*, 231 Ariz. at 493 ¶ 11; *State v. Dungan*, 149 Ariz. 357, 361 (App. 1985) ("[E]ven when indictments cite only an ineffective, repealed statute and not a currently effective law, courts refuse to reverse the conviction absent prejudice to the defendant.").

CONCLUSION

¶16 Because Zuchowski has shown no reversible error, his sentences are affirmed.

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