IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

VIRGIL JEROME BROOKS, *Appellant*.

No. 1 CA-CR 17-0170
FILED 2-27-2018

Appeal from the Superior Court in Yuma County
No. S1400CR201500698
The Honorable Stephen J. Rouff, Judge Pro Tem

AFFIRMED AS CORRECTED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Yuma County Legal Defender's Office, Yuma
By Joshua J. Cordova
Counsel for Appellant

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Jennifer M. Perkins joined.

T H O M P S O N, Judge:

¶1 Virgil Jerome Brooks (defendant) appeals from his convictions and sentences for one count of attempted first-degree murder and two counts of aggravated assault. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 Defendant and the victim, V.R., began dating in 2015. Shortly after they began dating, V.R., who was blind, moved in with defendant and his roommates in a house defendant's grandparents owned. Early in the morning on June 18, 2015, one of the roommates, C.J., awoke to the sound of defendant and V.R. arguing. She heard defendant yell, "I am not cheating on you, stop fucking with me." C.J. went back to sleep. Defendant and V.R. continued to argue in their bedroom, and defendant told V.R. he thought she was going to leave him. Defendant pulled V.R. out of her chair by her hair, threw her to the floor, and hit her approximately eight times.

¶3 C.J. woke up again, and heard V.R. say, "[M]y baby, don't hit me, don't ever hit me." Defendant told V.R., "I will kill you, bitch," and stabbed her twice in the back. C.J. heard V.R. say, "[B]aby, you stabbed me in the back. I can feel the blood dripping down my back." Defendant knocked on C.J.'s bedroom door and told her to call 911 because someone had broken in and stabbed V.R. C.J. left the house to call 911. On her way out, she observed defendant scrubbing a rug.

¶4 When police arrived at the house, V.R. was bleeding and semi-conscious. She told an officer that defendant stabbed her. V.R. was taken to the hospital, where she remained for several weeks. Besides the stab wounds she had suffered a broken nose, fractured eye socket, and developed a lung infection from the stab wounds.

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[1] We view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against defendant. *See State v. Nihiser*, 191 Ariz. 199, 201 (App. 1997).

¶5 Police interviewed defendant at the police station. He had dried blood on his chest and back. Defendant claimed that he and V.R. went to sleep together at around 2:00 a.m. He stated that he awoke when he heard V.R. screaming and being beaten, but stayed in bed because he was frightened and consequently did not see anything.

¶6 Police searched the house and found dried blood in defendant and V.R.'s bedroom, and blood and chunks of what appeared to be human tissue in the bathtub. They also found a bucket with water that smelled like bleach or detergent full of clothing in the backyard, and a wet t-shirt that appeared to have blood stains on it. There was no sign of a forced entry into the house.

¶7 Detective Francisco Saenz conducted a recorded interview of V.R. at the hospital on June 21, 2015. She told Detective Saenz that on the night she was stabbed defendant accused her of planning to leave him, and that he got mad and started hitting her with his fists before pulling her out of a chair by her hair. While she was laying on the floor, defendant left for a short period of time and then came back, told her "I'll kill you bitch," and started stabbing her. Defendant then told her that she was bleeding to death because "Somebody came and stabbed you." V.R. told the detective that she was positive she and defendant were the only ones in the room when she was stabbed, and that she recognized defendant's voice when he threatened to kill her. On June 30, 2015, Detective Kathryn Huntley spoke with V.R. at the hospital, and V.R. confirmed that it was defendant who attacked her and that she had recognized his voice.

¶8 The state charged defendant with one count of attempted first degree murder, a domestic violence offense (count 1) and two counts of aggravated assault, both domestic violence offenses (counts 2 and 3).[2] At trial, V.R. testified that the majority of her prior statements to police were untrue and admitted that she still loved defendant. The state treated V.R. as a hostile witness and impeached her with her prior statements identifying defendant as her assailant.

¶9 The jury convicted defendant as charged. Defendant agreed that the trial court should make the finding of whether he committed the offenses while on probation. The jurors found that all three offenses were dangerous and found that V.R.'s disability was an aggravating

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[2] The state later amended the indictment to add an allegation of historical prior felony convictions and an allegation that the offenses were committed while defendant was on probation.

circumstance. The trial court found that defendant committed the offenses while on probation. The court found there were no mitigating circumstances, and that in addition to the aggravating circumstance found by the jury, defendant's six prior felony convictions and the especially cruel and depraved manner of the offenses were aggravating circumstances. The court sentenced defendant to aggravated, concurrent terms of twenty-five years in prison on count 1 and twenty years in prison on counts 2 and 3. Defendant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2018), 13-4031 (2018), and -4033(A)(1) (2018).[3]

DISCUSSION

¶10 Defendant raises four issues on appeal: 1) whether the trial court committed fundamental error by finding that he committed the offenses while on probation rather than submitting that question to the jury, 2) whether the trial court committed fundamental error by imposing flat time enhanced sentences, 3) whether the trial court erred by denying his motion for directed verdicts of acquittal, and 4) whether the judgment and sentencing minute entry and order of confinement should be corrected.

A. Probation Finding

¶11 Defendant first argues that the trial court committed fundamental error by failing to submit the finding that he was on probation when he committed the present offenses to the jury, and therefore the court's use of his probation status to increase his sentence to a presumptive sentence was illegal. After the jury returned its guilty verdicts, the trial court and counsel discussed the additional issues and instructions to be submitted to the jurors. Defendant agreed that the issue of whether he was on probation while committing the offenses was a question for the court and not the jury:

> THE COURT: Okay. So we're going to retain number three, and you want to retain the question of whether it's a dangerous offense?
>
> [Defense counsel]: I believe that is a jury question.

[3] We cite to the current version of any statute unless the statute was amended after the pertinent events and such amendment would affect the result of this appeal.

> [Prosecutor]: Yes, Your Honor.
>
> THE COURT: And also the – committed while he was on probation?
>
> [Prosecutor]: That is a question for the Court as well, Your Honor, so we have to remove all of page seven.
>
> THE COURT: Are you in agreement with that as well?
>
> [Defense counsel]: Yes, Your Honor, I am.
>
> THE COURT: Okay. So we'll pull seven.
>
> . . .
>
> So it will just be two questions [for the jury], one and two. Victim has a disability, and the offense is a dangerous offense.
>
> [Prosecutor]: Yes, Your Honor.
>
> [Defense Counsel]: Yes, Your Honor.
>
> THE COURT: Are we in agreement on that?
>
> [Defense counsel]: Yes, sir.

The court then instructed the jury to deliberate on two questions—whether the victim had a disability and whether the charged offenses were dangerous.

¶12 Subsequently, the trial court held an aggravation hearing. At the outset of the hearing, the court noted, "I believe that counsel agreed that . . . it's for the Court to determine whether . . . the offenses were committed while the defendant was on felony probation . . . ." Defendant did not object. The court heard testimony from defendant's probation officer in CR2014-01092, Jeremy Heil. Heil positively identified defendant and testified that defendant was on probation on June 18, 2015, the day he committed the offenses in this case. Defendant's fingerprints were matched to his conviction in CR2014-01092, and the judgment of conviction and

sentence was admitted without objection.[4] The trial court found that the allegation that defendant was on probation had been proven.

¶13 The state concedes that, had defendant not affirmatively agreed that the trial court was to determine whether he committed the offenses while on probation, there would be error because defendant had a Sixth Amendment right to a jury determination of that fact as it elevated defendant's statutory minimum sentence from a mitigated sentence to the presumptive sentence. *See State v. Large*, 234 Ariz. 274, 279-80, ¶ 16 (App. 2014) (citations omitted). However, the invited error doctrine precludes a defendant "who participates in or contributes to an error" from complaining about it on appeal. *State v. Islas*, 132 Ariz. 590, 592 (App. 1982); *see also State v. Pandeli*, 215 Ariz. 514, 528, ¶ 50 (2007) ("This court has long held that a defendant who invited error at trial may not then assign the same error on appeal.") (citations omitted). Here, defendant invited error when defense counsel explicitly stated that he did not object to the trial court deciding defendant's probation status rather than the jury. *See Pandeli*, 215 Ariz. at 528, ¶ 50. Accordingly, we find no reversible error.

B. Flat Time Sentences

¶14 Defendant next argues that the trial court committed fundamental error by imposing a flat time requirement pursuant to A.R.S. § 13-708(A). He asserts that the court applied both -708(A) and -708(C) because the court used -708(C) to make his "sentence for all three convictions consecutive to the sentence for the probation violation, but also applied the flat-time sentence only found . . . in subsection (A)." Because defendant did not object to the trial court's application of flat time, we review for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005).

¶15 To prevail under fundamental error review, a defendant must show both that fundamental error exists and that the error caused the defendant prejudice. *Id.* at ¶ 20. 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 have possibly received a fair trial." *Id.* at ¶ 19 (internal quotation omitted). The burden of persuasion is on the defendant. *Id.*

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[4] In closing, defense counsel argued, "At best, the state has proven one prior felony conviction, that was the latest one, and that he was on probation at the time."

¶16 Section 13-708 (A) (2018) provides, in part:

> A person who is convicted of any felony involving a dangerous offense that is committed while the person is on probation for a conviction of a felony offense . . . shall be sentenced to imprisonment for not less than the presumptive sentence authorized under this chapter and is not eligible for suspension or commutation or release on any basis until the sentence imposed is served.

Further, A.R.S. § 13-711(A) (2018) provides, "Except as otherwise provided by law, if multiple sentences of imprisonment are imposed on a person at the same time, the sentence or sentences imposed by the court shall run consecutively unless the court expressly directs otherwise. . . ."

¶17 We find no fundamental error. The state alleged and the jury found that the offenses in this case (counts 1-3) were dangerous. The trial court found that defendant committed counts 1-3 while on probation in S1400CR201401092 and ordered the sentences for counts 1-3 to be served flat and concurrent, but consecutive to the sentence in S1400CR201401092. Section 13-708(A) did not preclude the court from ordering defendant's sentences in this case to be served consecutive to the sentence in S1400CR201401092, and although the court wrongly cited A.R.S. § 13-708(C) instead of -708(A), the flat time requirement clearly came from and was authorized by A.R.S. § 13-708(A). Defendant's sentences were not illegal.

C. Defendant's Rule 20 Motion

¶18 Defendant next argues that the trial court erred by denying his Arizona Rule of Criminal Procedure 20 (Rule 20) motion for judgment of acquittal on all three counts because insufficient evidence supported the charges. We review the trial court's ruling on a Rule 20 motion for judgment of acquittal de novo. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011) (citation omitted). "On all such motions, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at ¶ 16 (internal quotation omitted). We do not reweigh the evidence. *State v. Tison*, 129 Ariz. 546, 552 (1981). We

view the evidence in the light most favorable to sustaining the verdict. *State v. Girdler*, 138 Ariz. 482, 488 (1983).

¶19 Defendant argues that there was "no evidence whatsoever that [he] intended or knew that his actions and conduct would cause death," that there was no evidence that he owned or possessed the knives and scissors police took from the house,[5] and that the victim recanted her statements to police and testified that defendant was not the person or persons who attacked her.

¶20 Substantial evidence warranted the guilty verdicts. There was evidence that V.R. made multiple statements to police that it was defendant who attacked her before she recanted. In her interview with Detective Saenz, V.R. stated that defendant told her "I'll kill you bitch" before stabbing her. C.J. testified that she overheard defendant and V.R. fighting, that she heard V.R. say "Baby, you stabbed me," and that she saw defendant scrubbing a rug on the floor. When police arrived, they found evidence that someone had been cleaning up blood. Police observed blood on defendant's chest and back. The fact that defendant's fingerprints were not found on the knives and scissors removed from the house does not mean that a rational trier of fact could not find defendant guilty of counts 1-3 beyond a reasonable doubt. Moreover, V.R.'s recantation and the credibility of her testimony was properly put to the jury. *See State v. Krum*, 183 Ariz. 288, 294 (1995). We find no error.

D. Clerical Errors

¶21 Finally, defendant argues that the sentencing minute entry and/or order of confinement contain clerical errors that we should correct without remanding to the trial court. *See State v. Stevens*, 173 Ariz. 494, 495-96 (App. 1992). Our review of the court's March 7, 2017 judgment of conviction indicates that the court incorrectly cited A.R.S. § 13-1204(F), which, at the time defendant committed the offenses, pertained only to aggravated assaults committed on a prosecutor. *See* A.R.S. § 13-1204(F) (2014). Accordingly, we correct the judgment of conviction to delete the reference to A.R.S. § 13-1204(F).

CONCLUSION

¶22 For the foregoing reasons, we affirm defendant's convictions

[5] Police examined the knives for fingerprints but no usable fingerprints were found and scissors taken from the house were not tested.

and sentences.

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