IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

DON L. MEEKER, *Appellant*.

No. 1 CA-CR 18-0402
FILED 9-29-2020

Appeal from the Superior Court in Maricopa County
No. CR2016-135701-001
The Honorable Pamela S. Gates, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eric Knobloch
Counsel for Appellee

The Stavris Law Firm PLLC, Scottsdale
By Alison Stavris
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge James B. Morse Jr. delivered the decision of the Court, in which Judge Maria Elena Cruz and Judge Paul J. McMurdie joined.

M O R S E, Judge:

¶1 Don L. Meeker appeals his conviction and sentence for aggravated assault. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 We view the evidence in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Meeker. *See State v. Stroud*, 209 Ariz. 410, 412, ¶ 6 (2005). In July 2016, B.M. went to a medical clinic that serves low-income individuals. The clinic was closed when he arrived. With the clinic's permission, B.M. stayed in the clinic's courtyard that night, along with Meeker and several others.

¶3 B.M. saw Meeker and his fiancé "Taz" sitting next to an electrical outlet in the courtyard. B.M. asked Meeker if he could use the outlet to charge his phone. Meeker refused. Shortly after this exchange, Meeker overheard B.M. talking with a group of individuals about using the outlets. Meeker became angry and told the group that the outlet was his. As B.M. later testified, Meeker knelt in front of him, pulled out a "nine-inch buck knife," and threatened, "are we not going to have any problems, are we?"

¶4 A few hours later, Taz heard B.M. complain about needing to use an outlet. Taz argued with him for "about five minutes," then slapped him in the face. Right after Taz slapped B.M., B.M. felt something hit his back. He reached around to touch the area where he was struck, and he discovered blood on his hands. B.M. saw Meeker standing directly behind him, holding his "hunting knife covered in blood." Meeker ran away but left his bag and other possessions behind. B.M. was hospitalized for two days for treatment of his wound.

¶5 A police officer visited B.M. in the hospital that same night. B.M. reported the assault to the officer and described Meeker's appearance. The officer found Meeker at the clinic the next morning, and B.M. later identified Meeker as his assailant from a photographic lineup.

¶6 The State charged Meeker with aggravated assault, a class 3 dangerous felony. Meeker's first trial ended in a mistrial when the jurors could not reach a verdict. Following the retrial, a jury convicted Meeker as charged. Based on Meeker's prior convictions for "serious offenses," the trial court sentenced him under A.R.S. § 13-706(A)[1] to life imprisonment with the possibility of release after 25 years. We have jurisdiction over Meeker's timely appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

I. B.M.'s Competency to Testify.

¶7 Meeker argues the trial court erred by failing to *sua sponte* determine whether B.M. was competent to testify. Because Meeker did not raise this issue at trial, "we will not reverse unless the court committed error that was both fundamental and prejudicial." *State v. Escalante*, 245 Ariz. 135, 140, ¶ 12 (2018).

¶8 "Every person is competent to be a witness unless these rules or an applicable statute provides otherwise." Ariz. R. Evid. 601. A witness is incompetent to testify only when the witness "is unable to understand the nature of an oath, or perceive the event in question and relate it to the court." *State v. Peeler*, 126 Ariz. 254, 256 (App. 1980). A witness is not incompetent merely because the witness is under the influence of drugs or alcohol while testifying. *See State v. Cruz*, 218 Ariz. 149, 166, ¶¶ 104-06 (2008) (allowing "visibly intoxicated" witness to testify was not error because her "somewhat rambling" testimony was nonetheless coherent).

¶9 At a bench conference held shortly after B.M. began testifying, Meeker's counsel told the trial court, "[it] kind of sounds as though maybe [B.M.] is impaired." The court responded that it was "not noting that, but [would] keep [its] observations alert." Meeker did not again raise the issue during trial,[2] nor did he request the court to determine B.M.'s competency.

¶10 B.M. testified he had a valid medical marijuana card and used marijuana for treatment of a seizure disorder, obeying his doctor's orders

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[1] Absent material changes from the relevant date, we cite the current version of rules and statutes.

[2] Following the verdict, Meeker asserted B.M. was incompetent in a motion for new trial. But "an untimely objection first raised in a motion for a new trial does not preserve an issue for appeal." *State v. Davis*, 226 Ariz. 97, 101, ¶ 12 (App. 2010).

when he did. He admitted he had smoked marijuana the morning he testified and again during the lunch break that day. B.M. further acknowledged that, on the night of the assault, he had consumed "a third to a half a bottle of rum" before he was stabbed. Based on this testimony, Meeker argues B.M. was incompetent because he admitted "drug usage, at both the time of the incident as well as during the time of testimony."

¶11 First, even assuming B.M. was intoxicated when he was stabbed, intoxication would not compel the trial court to find him incompetent to testify. *See State v. Jeffers*, 135 Ariz. 404, 420 (1983). Rather, B.M.'s ability to perceive the assault and the reliability of his account of events due to alleged intoxication at the time presented a credibility issue for the jury, not a legal question of his competency. *See State v. Canez*, 202 Ariz. 133, 149, ¶ 39 (2002) ("[C]redibility of witnesses is a matter for the jury."); *Zimmer v. Peters*, 176 Ariz. 426, 429 (App. 1993) (distinguishing legal competency from credibility, which is a "question for the fact-finder and examines the reliability of the witness' testimony"). Meeker cross-examined B.M. about his memory and intoxication on the night of the assault, placing B.M.'s credibility squarely before the jury. The jurors nonetheless chose to accept B.M.'s testimony. *See Canez*, 202 Ariz. at 149, ¶ 39.

¶12 Second, consuming marijuana on the day he testified did not in itself render B.M. incompetent to testify. *See Cruz*, 218 Ariz. at 166, ¶ 106. The trial court expressly considered Meeker's suggestion that B.M. may be impaired, yet it never noted any concerns with B.M.'s coherence or ability to testify. *See id*. To the contrary, the record reveals B.M. fully understood the proceedings and the questions he was asked, even during the extensive, and at times contentious, cross-examination. *See Peeler*, 126 Ariz. at 256. Therefore, the trial court committed no error, let alone fundamental error.

II. Motion for Mistrial.

¶13 Meeker next contends the trial court erred by denying his motion for mistrial based on an officer's testimony. We review the court's ruling for abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32 (2000).

¶14 Before the trial, Meeker moved to preclude any reference to the first trial that resulted in a mistrial. The trial court granted the motion, directing the parties to instruct the witnesses "to only refer to a prior court proceeding and [e]nsure that they do not ever reference a prior trial."

¶15 During Meeker's cross-examination of an officer, his counsel asked if other officers were involved in the investigation when he was arrested. This exchange then occurred:

> Q. Any officers that we have heard from at trial?
>
> A. You only heard from Officer Rohkohl and the county attorney detective, correct? At which trial?

¶16 Meeker immediately asked for a bench conference and asserted the officer had violated the trial court's order. Also, outside the presence of the jury, Meeker moved for a mistrial. The court agreed the reference was improper but denied Meeker's motion, finding the officer did not act in bad faith and that the reference was not likely to unduly prejudice the jury.

¶17 The trial court instead offered to provide a curative instruction, and Meeker accepted the offer. Using Meeker's proposed language, the court instructed the jury:

> [T]he term "trial" used by the State's witness, Officer Miller, does not refer to a trial involving Mr. Meeker where he has been proven guilty of any wrongdoing whatsoever and is not relevant to the State's duty to prove every element of the crime charged in this case. The jury is to disregard Officer Miller's characterization of the word "trial." It's the State's burden to prove guilt beyond a reasonable doubt and that burden never shifts to the defendant.

¶18 "A declaration of a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson*, 136 Ariz. 250, 262 (1983). We give great deference to the trial court's denial of a mistrial because it "is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Jones*, 197 Ariz. at 304, ¶ 32. When improper testimony has been introduced, the court must consider (1) whether the remarks called the jurors' attention to matters they should not consider in reaching their verdict and (2) the probability that the testimony influenced the jurors under the circumstances of the particular case. *Id*.

¶19 Applying the first prong of the mistrial analysis, the trial court expressly found the "trial" reference was improper. But turning to the second prong, nothing on this record overcomes our deference to the trial court's determination. *See id*. As the court concluded, the officer's brief reference would not unduly influence the jurors' decision, particularly given that the jury had already heard numerous references to a prior court "proceeding" or "hearing." *See State v. Laird*, 186 Ariz. 203, 207 (1996)

(upholding denial of mistrial because inadmissible testimony was brief); *State v. Almaguer*, 232 Ariz. 190, 199, ¶ 29 (App. 2013) (finding no reasonable probability jurors influenced by improper but isolated testimony).

¶20 Furthermore, the instruction — approved and read by the court as submitted by Meeker — to disregard the "trial" reference, and emphasize the State's burden, eliminated any reasonable probability the improper reference would influence the jury's verdict. *See Almaguer*, 232 Ariz. at 199, ¶ 29; *State v. Herrera,* 174 Ariz. 387, 395 (1993) (stating that jurors are presumed to follow instructions). For these reasons, the trial court acted within its broad discretion in denying Meeker's motion for mistrial.

III. Meeker's Motions for Judgment of Acquittal and New Trial.

¶21 After the State rested, Meeker moved for a judgment of acquittal. *See* Ariz. R. Crim. P. 20(a)(1). He then moved for a new trial after the verdict. *See* Ariz. R. Crim. P. 24.1(c). The trial court denied both motions.

A. Sufficiency of the Evidence.

¶22 Meeker first contends the trial court should have granted his Rule 20 motion. He argues that insufficient evidence supported the conviction because B.M. was impaired both at the time of the assault and during his testimony, and the State presented no corroborating evidence identifying Meeker as the perpetrator. We review de novo a trial court's ruling on a Rule 20 motion. *State v. West*, 226 Ariz. 559, 563, ¶ 19 (2011).

¶23 Meeker further asserts the trial court should have ordered a new trial under Rule 24.1(c)(1) because the verdict was contrary to law or the weight of the evidence. Because Meeker did not move for a new trial on those grounds, we review only for fundamental error. *See Escalante*, 245 Ariz. at 140, ¶ 12.

¶24 We address Meeker's Rule 20 and Rule 24.1(c)(1) arguments together. *See State v. Mincey*, 141 Ariz. 425, 432-33 (1984) (noting the similarity of Rule 20 and Rule 24.1 standards in deciding issues of sufficiency and weight of evidence without separate analyses); *State v. Davis*, 226 Ariz. 97, 99, ¶¶ 6-7 (App. 2010) (finding no error in denying a motion for a new trial based on the defendant's claim verdict was against "the weight of the evidence" when the State had presented "sufficient" evidence). We will not reverse the trial court's denial of a motion for judgment of acquittal or a jury's guilty verdict unless there is a "complete

absence of probative facts" to support the conviction. *See State v. Miles*, 211 Ariz. 475, 481, ¶ 23 (App. 2005) (quotation omitted).

¶25 A judgment of acquittal is appropriate only when there is "no substantial evidence to warrant a conviction." *See* Ariz. R. Crim. P. 20(a)(1); *State v. Fulminante*, 193 Ariz. 485, 493, ¶ 24 (1999). "[T]he 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." *West*, 226 Ariz. at 562, ¶ 16 (quotation omitted). In reviewing whether evidence is sufficient, we neither reweigh the evidence nor examine credibility. *See State v. Buccheri-Bianca*, 233 Ariz. 324, 334, ¶ 38 (App. 2013).

¶26 We generally review a trial court's ruling on a motion for new trial based on weight of the evidence for abuse of discretion. *State v. Parker*, 231 Ariz. 391, 408, ¶ 74 (2013). "A motion for new trial should be granted only if the evidence was insufficient to support a finding beyond a reasonable doubt that the defendant committed the crime." *Id*. (quotation omitted). The trial court has "broad discretion" to "weigh the evidence, make credibility determinations, and set aside the verdict and grant a new trial even if there is sufficient evidence in the record to support the verdict." *State v. Fischer*, 242 Ariz. 44, 50, ¶ 21 (2017). The reviewing court, on the other hand, defers to the "discretion of the trial judge who tried the case and who personally observed the proceedings" and is prohibited from "independently reweighing the evidence." *Id*. at 50, 52, ¶¶ 21, 30.

¶27 As presented to the jury, the crime of aggravated assault required proof that Meeker intentionally, knowingly, or recklessly caused physical injury to B.M. by using a deadly weapon. *See* A.R.S. §§ 13-1203(A)(1), -1204(A)(2). Here, the evidence established that B.M. was seriously injured when he was stabbed with a large knife, and Meeker did not contest these facts. The identity of the assailant was the only issue for the jury to resolve.

¶28 In the first trial, Meeker testified he was staying in the courtyard the night B.M. was attacked and saw the fight between Taz and B.M. but left before B.M. was stabbed. Although Meeker did not testify in the second trial, an officer recounted Meeker's statements to the jurors.

¶29 In the second trial, B.M. testified he saw Meeker holding a bloody knife immediately after he was stabbed, the same knife Meeker had used to threaten him earlier in the night. B.M. told the jurors he was "100 percent" certain Meeker stabbed him. B.M. also described Meeker to an

investigating officer and identified Meeker as his assailant in a photographic lineup. In addition, police found Meeker at the clinic the next morning.

¶30 The jury was free to believe B.M. despite Meeker's challenges to his credibility. *See Canez*, 202 Ariz. at 149, ¶ 39; *State v. Bronson*, 204 Ariz. 321, 328, ¶ 34 (App. 2003) ("Because a jury is free to credit or discredit testimony, we cannot guess what they believed, nor can we determine what a reasonable jury should have believed.") (quotation omitted). Nor was the State required to present a witness to corroborate B.M.'s testimony. *See State v. Montano*, 121 Ariz. 147, 149 (App. 1978) ("[O]ne witness, if relevant and credible, is sufficient to support a conviction."). The facts are sufficient to allow a reasonable juror to conclude that Meeker stabbed B.M. Therefore, the trial court committed no error in denying Meeker's Rule 20 motion or by failing to *sua sponte* order a new trial.

B. Motion for New Trial on Other Grounds.

¶31 Meeker further argues he was entitled to a new trial because (1) B.M. was incompetent, (2) the court should have granted a mistrial after the officer's improper reference, and (3) the court should have granted his Rule 20 motion. Because the trial court committed no error in deciding any of these matters, it acted entirely within its discretion by refusing to grant a new trial on those grounds.

IV. Imposition of Life Sentence under A.R.S. § 13-706(A).

¶32 Before trial, the State alleged that because Meeker had two prior felony convictions for "serious offenses," the court had to sentence him to life imprisonment if he was convicted of a third "serious offense." *See* A.R.S. § 13-706(A) (mandating life imprisonment for third serious-offense conviction if prior offenses were not committed on the same occasion). Meeker does not dispute that he was convicted of several prior "serious offenses." He contends, however, his prior offenses were committed on the same occasion, meaning he had only one serious-offense conviction under § 13-706(A). *Id*.

¶33 We review de novo "[c]onclusions of law and the interpretation of statutes and rules." *Alvarado v. Thomson*, 240 Ariz. 12, 14, ¶ 11 (App. 2016). To determine whether offenses were committed on the same occasion for purposes of sentence enhancement, the trier of fact must use the "factors test," analyzing "1) time, 2) place, 3) number of victims, 4) whether the crimes were continuous and uninterrupted, and 5) whether they were directed to the accomplishment of a single criminal objective."

State v. Kelly, 190 Ariz. 532, 535, ¶ 6 (1997); *see State v. Noble*, 152 Ariz. 284, 286 (1987); *see also State v. Flores*, 236 Ariz. 33, 35, ¶ 6 n.2 (App. 2014) (noting *Kelly* factors are exclusive).

¶34 After the verdict, the trial court held a hearing in which the State presented evidence of Meeker's prior felony convictions, including a sentencing minute entry and a packet of documents from the Department of Corrections. The court found:

> [B]eyond a reasonable doubt that Mr. Meeker has been charged and convicted in Case No. CR129299, with Count 1 through 9, armed robbery, committed on September 25, 1982. He was convicted on June 16, 1983. Each offense is a Class 2 dangerous felony. And he was represented by counsel. In that same cause number, Mr. Meeker was also convicted of aggravated assault, a Class 3 dangerous felony, with a commission date of September 26, 1982, for Count 10.

¶35 Meeker later asserted that he committed these prior offenses on the same occasion. The trial court held additional hearings to examine the same-occasion issue before imposing a sentence. During that time, the State provided the court with certified copies of the indictment and presentence report ("PSR") from CR129299.

¶36 The trial court ultimately concluded that Meeker's prior offenses occurred on different occasions, requiring it to impose life imprisonment under § 13-706(A). Specifically, the court found that "Count 1 is clearly a different occasion than Count 10" because the "record indicates that Count 1 occurred at midnight on September 25th and that Count 10 did not occur until an hour and a half later." The court noted that Count 10 also involved a different victim and different offense than Count 1.

¶37 Meeker argues that all of his prior convictions arose from the same occasion because he and his co-defendants committed a series of armed robberies over a few hours in one location. But our supreme court resolved this issue when it affirmed the convictions of Meeker's co-defendant in CR129299. *State v. Perkins*, 144 Ariz. 591 (1985), *overruled in part on other grounds*, *State v. Noble*, 152 Ariz. 284, 288 (1987). In *Perkins*, the court addressed whether the defendant's crimes constituted "spree" offenses that would bar consecutive life sentences imposed by the trial court. *Id*. at 595 ("The only question, therefore, is whether these incidents were 'different occasions' for purposes of A.R.S. § 13-604(H)."). The court found the crimes were committed on different occasions and rejected

Perkins's argument that the robberies were part of a common scheme, explaining:

> In each of these three armed robbery incidents, there were distinct crimes committed against distinct victims, with different valuables taken in each robbery. The acts used to establish the elements of each robbery incident were distinct. There was separate danger created in each robbery by appellant's use of the shotgun to threaten the victims. In two of these three incidents, one of the victims was actually harmed by appellant. Overall, nine persons were robbed; ten persons were threatened with deadly weapons. Appellant and his accomplices apparently did not form the intent to proceed to a new robbery until after completing the prior robbery. The additional criminal incidents were not necessary to complete either the initial robbery encounter or to escape afterward. Different evidence was used to prove each robbery incident because there were different eyewitnesses to each crime.

Id. at 597.

¶38 Without objection, the trial court also considered the indictment and the PSR, which aligned with the facts recounted in *Perkins*. According to the PSR, the offenses charged in Counts 1 through 4 occurred on September 25, 1982, before midnight, when the defendants robbed the first group of victims. The offenses charged in Counts 5 and 6 occurred on September 26, 1982, at about 1:30 a.m., when Meeker and Perkins robbed the second group of victims. Counts 7 through 10 then occurred at the same location shortly after the second set of robberies when the defendants robbed two more victims and assaulted another.

¶39 Meeker does not contend, much less demonstrate, that his case is distinguishable from *Perkins*. Given that Meeker was convicted of the same charges as his co-defendant, on the same set of facts, Meeker's same-occasion argument necessarily fails.

¶40 Applying the *Kelly* factors here, Meeker's conviction on Count 10 involved a different time, different victim, and different offense than, at minimum, his conviction on Count 1. *See* 190 Ariz. at 534, ¶ 6; *see also Flores*, 236 Ariz. at 36, ¶ 9 ("[W]e have found no Arizona case concluding that offenses were committed on the same occasion when the crimes were committed on different days, involved different property, or had unrelated

victims.") (collecting cases, including *Perkins*). For the reasons stated in *Perkins*, *supra* ¶ 38, the crimes were neither part of a single criminal objective nor continuous and uninterrupted. *See Kelly*, 190 Ariz. at 534, ¶ 6. Therefore, because the *Kelly* factors fully support the trial court's conclusion that the offenses occurred on different occasions, we find no error.

V. Right to Jury Trial Determination under A.R.S. § 13-706(A).

¶41 Meeker argues the trial court erred by failing to *sua sponte* submit the same-occasion determination to a jury, in violation of the Sixth Amendment and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). An illegal sentence generally constitutes fundamental error. *State v. Thues*, 203 Ariz. 339, 340, ¶ 4 (App. 2002). But because Meeker did not object on this basis below, we review his argument only for fundamental, prejudicial error. *See Escalante*, 245 Ariz. at 142, ¶ 21; *see also Henderson*, 210 Ariz. at 565-66, 567, ¶¶ 12, 20 (noting that *Apprendi* errors are not structural and "defendant must establish both that fundamental error exists and that the error in his case caused him prejudice").

¶42 "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." *Apprendi*, 530 U.S. at 490; *see Almendarez-Torres v. United States*, 523 U.S. 224, 226-28, 243-44, 247 (1998) (holding that prior convictions are sentencing enhancements, not elements of a crime, and need not be submitted to a jury); *Alleyne v. United States*, 570 U.S. 99, 111-12, n.1 (2013) (declining to reconsider the prior-conviction exception when extending *Apprendi* "to facts increasing the mandatory minimum"). "[P]ermitting a judge to decide the 'fact' of a prior conviction does not raise Sixth Amendment concerns; those convictions are themselves products of Sixth Amendment-compliant proceedings." *State v. Ring*, 204 Ariz. 534, 557, ¶ 60 (2003).

¶43 Meeker cites *Flores* to argue he was entitled to have a jury decide whether he committed his prior offenses on the same occasion. Meeker's reliance on *Flores* is misplaced. *Flores* held that when multiple felony offenses are consolidated in a defendant's *current* trial, determining whether offenses were committed on the same occasion must be "submitted to the jury, inherent in the jury's verdicts, or otherwise excepted from *Alleyne* and *Apprendi*" before the trial court may enhance a sentence on that basis. 236 Ariz. at 35, ¶ 5; *see* A.R.S. § 13-703(A) (enhancing a defendant's sentence when he or she is "convicted of multiple 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").

¶44 However, *Flores* did not hold that a jury must determine whether a defendant's offenses in *prior convictions* were committed on the same occasion. 236 Ariz. at 35, ¶ 5 n.1. And those are the circumstances here.[3] Indeed, the *Flores* court expressly chose not to decide whether *Apprendi* required a jury to determine the same-occasion issue in the context of prior convictions. 236 Ariz. at 35, ¶ 5 n.1 (reserving the issue of "whether the analysis would differ in determining if prior convictions were committed on the same occasion pursuant to § 13-703(L), or whether the *Apprendi* prior-conviction exception would apply to that analysis"); *see* A.R.S. § 13-703(L) (stating that "[c]onvictions for two or more offenses committed on the same occasion shall be counted as only one conviction for the purposes" of repetitive-offender sentencing provisions).

¶45 No Arizona court has since addressed the same-occasion issue reserved in *Flores*.[4] Although their decisions are not binding, we may look to the federal circuit courts for persuasive authority. *See Phoenix Newspapers, Inc., v. Reinstein*, 240 Ariz. 442, 449, ¶ 25 (App. 2016) (citation omitted).

¶46 The Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), is a federal statute that mandates enhanced sentences for habitual violent offenders like Arizona's repetitive-offender statutes. *See Flores*, 236 Ariz. at 38, ¶ 16 n.7 (noting the similarity between the ACCA and Arizona's repetitive-offender statutes). Section 924(e)(1) mandates a minimum

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[3] The second prong of § 13-703(A) for multiple felony offenses that are "not historical prior felony convictions" likewise does not apply to Meeker. As dangerous offenses, his prior felony convictions are historical. *See* A.R.S. § 13-105(22)(a)(ii).

[4] The issue appears not to have been raised in several post-*Apprendi* cases addressing whether the trial court correctly determined whether prior offenses occurred on the same occasion under § 13-703(L) or its predecessor statutes. *See State v. Burgess*, 245 Ariz. 275, 280-81, ¶¶ 19-22 (App. 2018) (discussing trial court's same-occasion finding when modifying sentences because incorrect statute was applied); *State v. Rasul*, 216 Ariz. 491, 496-97, ¶¶ 20-27 (2007) (vacating trial court's sentence after court erred in finding offenses occurred on different occasions); *State v. Derello*, 199 Ariz. 435, 436, 437, ¶¶ 2, 8 (App. 2001) (rejecting conclusion that prior offenses constituted separate convictions but holding that a trial court determines historical prior felony convictions as "mixed question of law and fact"). None of these cases identified any Sixth Amendment concerns because the trial court, rather than a jury, determined the same-occasion issue.

sentence of fifteen years' imprisonment for federal defendants who have "three previous convictions . . . for a violent felony or serious drug offense, or both, committed on occasions different from one another[.]"

¶47 In applying *Apprendi* to § 924(e)(1), "[e]very circuit court to consider the [same-occasion] issue has concluded the question is one for the sentencing court, not a jury." *United States v. Harris*, 447 F.3d 1300, 1304 (10th Cir. 2006) (stating "separateness falls within the prior crimes exception" to a defendant's jury-trial right and collecting cases from the Second, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits); *see United States v. Blair*, 734 F.3d 218, 228 (3d Cir. 2013) (collecting cases to include D.C. and Eleventh Circuits). Recently, the Ninth Circuit again affirmed this principle, upholding the application of the ACCA to a defendant when the "sentencing judge needed to look no further than the face of the certified judgments to determine the convictions were for distinct acts." *United States v. Walker*, 953 F.3d 577, 580-82 (9th Cir. 2020).

¶48 *Harris* reasoned that *Apprendi* "expressly excluded a defendant's prior criminal history as a matter for jury deliberation[,]" and concluded that whether a defendant committed prior offenses on different occasions was part of that "prior criminal history," subject to determination by a court, not the jury. 447 F.3d at 1303-04. In support of that conclusion, *Harris* cited a Fourth Circuit case that noted the "different occasion" issue turns on record documents of the sort used to prove a prior conviction in the first instance: "[The] ACCA's use of the term 'occasion' requires recourse only to data normally found in conclusive judicial records, such as the date and location of an offense, upon which [Supreme Court precedents] say we may rely." 447 F.3d at 1304 (quoting *United States v. Thompson*, 421 F.3d 278, 286 (4th Cir. 2005)); *see also United States v. Santiago*, 268 F.3d 151, 157 (2d Cir. 2001) (explaining the different-occasion issue "falls safely within the range of facts traditionally found by judges at sentencing and is sufficiently interwoven with the facts of the prior crimes that *Apprendi* does not require different fact-finders and different burdens of proof").

¶49 Based on the analysis in the federal authorities, we discern no *Apprendi* violation here. The court needed to decide if Meeker's prior convictions occurred on the same occasion. *See Santiago*, 268 F.3d at 157. Without objection by Meeker, the trial court relied on information from official court records to make its decision, some of which the State had already used to prove his prior convictions in the first instance: the indictment, sentencing minute entry, PSR, and appellate record. *See State v. Ortiz*, 238 Ariz. 329, 344, ¶ 69 (App. 2015) (listing records the trial court may consider to decide same-occasion issue, including indictment, verdict

forms, and elements of the offense, or "some comparable judicial record of this information") (quotation omitted); *State v. Joyner*, 215 Ariz. 134, 139-40, ¶¶ 12-16 (App. 2007) (discussing documentary evidence a trial court may consider in finding whether a conviction was "violent offense").

¶50 The trial court thus made its determination based solely on official records of judicial proceedings that established Meeker's convictions were for different crimes committed against different victims at different times. *See Blair*, 734 F.3d at 227 (finding no *Apprendi* error in the trial court determining separateness issue "[w]hen the pertinent documents show, as they do in this case, that the prior convictions are for separate crimes against separate victims at separate times"). Accordingly, the trial court did not violate Meeker's right to a jury trial under *Apprendi* by deciding that the offenses underlying his prior convictions were not committed on the same occasion.

CONCLUSION

¶51 For the foregoing reasons, we affirm Meeker's conviction and sentence.

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