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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

ALEXANDER HUNT, *Appellant*.

No. 1 CA-CR 19-0129
FILED 5-19-2020

Appeal from the Superior Court in Maricopa County
No. CR2018-108889-001
The Honorable Gregory Como, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Tucson
By Diane L. Hunt
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Nicholaus Podsiadlik
Counsel for Appellant

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MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge David D. Weinzweig and Judge Jennifer M. Perkins joined.

M O R S E, Judge:

¶1 Alexander Hunt appeals his convictions and sentences for armed robbery and aggravated robbery. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 The victim, W.S., met M.B., a licensed private dancer, through a social media dating application. On February 17 they met and went to M.B.'s apartment around 3:30 a.m. Minutes after W.S. entered the apartment, Hunt, holding a knife, and an accomplice, holding a gun, rushed in yelling "this is a robbery." Hunt and the accomplice instructed W.S. to undress and stole his cell phone, credits cards, and cash. They returned W.S. to his car and threatened to kill him if he reported the robbery.

¶3 W.S. located a police officer and reported what happened. Police went to M.B.'s apartment a few hours later. Hunt and M.B. were there and police learned that they were dating. M.B. corroborated W.S.'s version of the events and identified Hunt as the robber holding a knife.

¶4 The State charged Hunt with armed robbery, a class two dangerous felony, and aggravated robbery, a class three dangerous felony. After a five-day trial, the jury convicted Hunt as charged. The superior court sentenced Hunt as a repetitive offender to slightly aggravated, concurrent terms of 17 years' imprisonment for armed robbery and 13 years' imprisonment for aggravated robbery. Hunt timely appealed, and we have jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

I. Alleged Sentencing Error.

¶5 Hunt argues that the superior court improperly considered his use of a deadly weapon or dangerous instrument to aggravate his armed robbery sentence in violation of A.R.S. § 13-701(D)(2). Because Hunt failed

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to object to the sentence, we review for fundamental, prejudicial error. *State v. Escalante*, 245 Ariz. 135, 140, ¶ 12 (2018). "An illegal sentence constitutes fundamental error." *State v. Cox*, 201 Ariz. 464, 468, ¶ 13 (App. 2002).

¶6 In the aggravation phase of the trial, the jury found the following aggravating factors generally applicable to both offenses: Hunt's status on community supervision at the time of the offenses; the offenses were committed for pecuniary gain; the offenses caused emotional or financial harm to the victim; and the offenses were dangerous because each involved the use or threatened use of a deadly weapon or dangerous instrument ("deadly weapon aggravating factor"). The jury specifically found the presence of an accomplice as another aggravating factor for armed robbery. Following a later evidentiary hearing, the superior court found that Hunt had three historical prior felony convictions.

¶7 Because of his criminal history, the superior court sentenced Hunt as a category 3 repetitive offender instead of as a dangerous offender. See A.R.S. §§ 13-703(C), (J), -704; *State v. Laughter*, 128 Ariz. 264, 269 (App. 1980) (holding that the superior court has authority to sentence a defendant as a repetitive offender or dangerous offender). The superior court described the "multiple aggravating factors" at sentencing, including that the crime was committed with a dangerous instrument or a deadly weapon, there was a threat of serious injury or death to the victim, the crime was committed for pecuniary gain, and his felony convictions within the past ten years. The court added that "there are other [factors]" such as the fact that he was on parole at the time but those were "some that just come to mind readily." The superior court informed Hunt that it "would probably give [Hunt] more time, a greater deviation from the presumptive sentence because of all the aggravating factors" but declined to do so because of the "lengthy prison sentences" it imposed. The superior court found no mitigating factors.

¶8 The superior court may not consider the "use, threatened use or possession of a deadly weapon or dangerous instrument" as an aggravating circumstance if it is an "essential element of the offense of conviction or has been utilized to enhance the range of punishment under § 13-704." A.R.S. § 13-701(D)(2); see *State v. Trujillo*, 227 Ariz. 314, 318, ¶ 15 (App. 2011) (aggravating a sentence based on a prohibited aggravating factor constitutes fundamental error). "A person commits armed robbery if, [while] committing [a] robbery . . . such person or an accomplice: (1) Is armed with a deadly weapon or a simulated deadly weapon; or (2) Uses or threatens to use a deadly weapon or dangerous instrument or a simulated

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deadly weapon." A.R.S. § 13-1904(A).¹ "A person commits aggravated robbery if in the course of committing robbery . . . such person is aided by one or more accomplices actually present." A.R.S. § 13-1903(A).

¶9 The superior court did not improperly consider the deadly weapon as an aggravating factor. The superior court identified several aggravating factors in pronouncing a slightly aggravated sentence, including a brief reference to the deadly-weapon aggravator, but did not explain its reliance on any particular factor for either offense. Nor was it required to do so. *See State v. Harrison*, 195 Ariz. 1, 4, ¶ 12 (1999) (providing that the superior court need not recite a "specific litany" or make "formal findings or conclusions" at sentencing but the record must sufficiently articulate the reasons for aggravating a sentence).

¶10 The superior court could lawfully consider the deadly weapon aggravating factor for aggravated robbery because the offense has no "deadly weapon" element, A.R.S. § 13-1903(A), and the sentence was not enhanced as a dangerous offense under A.R.S. § 13-704. *See* A.R.S. §§ 13-701(D)(2), -1903(A). Further, the record does not show the court considered the deadly weapon aggravator for armed robbery instead of aggravated robbery. Without evidence indicating otherwise, we presume that the superior court properly considered the sentencing factors before it. *See State v. Brewer*, 170 Ariz. 486, 503 (1992) (stating that "[a]bsent proof to the contrary," the reviewing court presumes that a trial judge considered only relevant sentencing factors).

¶11 The superior court also declined to fully consider the many aggravating factors present, explaining that its recited list was not exhaustive. Thus, contrary to Hunt's argument, the record shows that the superior court limited the weight of the aggravating factors it considered. Therefore, Hunt fails to meet his burden to demonstrate trial error. *See Escalante*, 245 Ariz. at 142, ¶ 21 ("[T]he first step in fundamental error review is determining whether trial error exists . . . [t]he defendant bears the burden of persuasion[.]").

¹ We assume, without deciding, that the use or possession of a deadly weapon is an essential element of armed robbery for purposes of A.R.S. § 13-701(D)(2) even though the offense may be committed with a "simulated deadly weapon" pursuant to A.R.S. § 13-1904(A). *Cf. State v. Orduno*, 159 Ariz. 564, 567 (1989) (distinguishing *State v. Bly*, 127 Ariz. 370 (1980) because a deadly weapon/dangerous instrument was not "a necessarily included element" of armed robbery).

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¶12 Hunt also fails to establish prejudice. Hunt's status on community supervision precluded a sentence less than the presumptive term of 15.75 years. *See* A.R.S. §§ 13-703(J), -708(C). Because the superior court found no mitigating factors to weigh against the numerous aggravating factors, a sentence greater than the presumptive sentence was appropriate, and the superior court lawfully aggravated Hunt's sentence by fifteen months. *See* A.R.S. § 13-701(C), (F); A.R.S. § 13-703(D), (J); *see also State v. Munninger*, 213 Ariz. 393, 397, ¶ 12 (App. 2006) (explaining that no fundamental error occurs when a sentence is within the aggravated range and "it is clear that an aggravated sentence would have been imposed even if the improper aggravator had not been used[.]").

¶13 Hunt suggests that he "could have" received a more lenient sentence by "several months" if the superior court did not improperly consider the deadly weapon aggravating factor. But he fails to identify any supporting evidence from the record. Nor does he account for the undisputed aggravating factors that support his sentence (namely, harm to the victim, pecuniary gain, use of an accomplice, and criminal history). Hunt also ignores the superior court's statement that its initial inclination was to "give [Hunt] more time." Hunt's speculation that he might have received a lesser sentence does not establish prejudice for fundamental error review. *Munninger*, 213 Ariz. at 397, ¶ 14.

II. Alleged Double Jeopardy Violation.

¶14 Hunt next argues that his convictions for armed robbery and aggravated robbery violated double jeopardy because "as charged and convicted, aggravated robbery was a lesser-included offense of armed robbery." Because Hunt failed to raise his due process argument in the superior court, we review for fundamental, prejudicial error only. *Escalante*, 245 Ariz. at 140, ¶ 12. "A conviction or sentence that violates double jeopardy constitutes fundamental error." *State v. Jurden*, 239 Ariz. 526, 528, ¶ 7 (2016). We review *de novo* whether a double jeopardy violation occurred, *State v. Braidick*, 231 Ariz. 357, 359, ¶ 6 (App. 2013), and whether an offense is lesser-included, *State v. Cheramie*, 218 Ariz. 447, 448, ¶¶ 7-8 (2008).

¶15 The Double Jeopardy Clauses in the United States and Arizona Constitutions prohibit multiple punishments for the same offense. *Ohio v. Johnson*, 467 U.S. 493, 497-98 (1984); *see* U.S. Const. amend. V; Ariz. Const. art. 2, § 10; *see also State v. Brown*, 217 Ariz. 617, 620, ¶ 7 (App. 2008) (explaining that multiplicity occurs "when an indictment charges a single offense in multiple counts" and implicates double jeopardy because it raises

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the potential for multiple punishments (citation omitted)). "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932); see *United States v. Dixon*, 509 U.S. 688, 703-04, 711 (1993) (holding that the "same-elements" test exclusively determines a double jeopardy claim and overruling the additional "same-conduct" test adopted by *Grady v. Corbin*, 495 U.S. 508 (1990)); see also *State v. Carter*, 245 Ariz. 382, 387, ¶ 12 (App. 2018) ("[T]o determine whether convictions pursuant to different statutes constitute the 'same offense,' courts apply the rule of construction found in *Blockburger*"). Another felony conviction for the same offense constitutes punishment for double jeopardy purposes even if concurrent sentences are imposed. See *Brown*, 217 Ariz. at 621, ¶ 13 (citing *Ball v. United States*, 470 U.S. 856, 864-65 (1985)).

¶16 To analyze a double jeopardy claim, we examine the prima facie elements of the offenses for which the defendant was convicted to determine whether each offense contains an element not found in the other. *Dixon*, 509 U.S. at 697, 703-04; see *State v. Price*, 218 Ariz. 311, 313, ¶ 5 (App. 2008) (explaining that when examining double jeopardy, "we analyze the elements of the offenses, not the facts of the case[.]"). "[A] defendant may not be convicted for both an offense and its lesser[-]included offense, because they are considered the 'same offense' for double jeopardy purposes." *State v. Ortega*, 220 Ariz. 320, 324, ¶ 9 (App. 2008). "[A] crime is a lesser[-]included offense if the crime is composed *solely* of some but not all of the elements of the greater crime so that it is *impossible* to commit the greater offense without committing the lesser." *State v. Kamai*, 184 Ariz. 620, 622 (App. 1995) (emphasis added); cf. *State v. Siddle*, 202 Ariz. 512, 516-17, ¶ 12 (App. 2002) ("[I]n the context of a single trial, even if statutory provisions do constitute the same offense, we will not conclude that multiple punishments are prohibited if we can discern that the legislature clearly intended otherwise." (citations omitted)).

¶17 Armed robbery and aggravated robbery are not the "same offense" because each requires proof of a non-common element: armed robbery requires the use of a deadly weapon (or simulated deadly weapon), but aggravated robbery does not; aggravated robbery requires the assistance of an accomplice, but armed robbery does not. See A.R.S. §§ 13-1903(A), -1904(A); *Dixon*, 509 U.S. at 697, 703-04. Hence, they are distinct felonies for double jeopardy purposes because each contains a requisite element that is not present in the other. *Dixon*, 509 U.S. at 697, 703-04; *State v. Eagle*, 196 Ariz. 188, 190, 192-93, ¶¶ 6, 18 (2000). Likewise, Hunt's

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argument that aggravated robbery is a lesser-included offense of armed robbery is unavailing. Because the State may prove either armed robbery or aggravated robbery without proving the other, aggravated robbery is not a lesser-included offense of armed robbery and not the "same offense." *See Kamai*, 184 Ariz. at 622; *see also State v. Cope*, 241 Ariz. 323, 325 (App. 2016) ("[T]o avoid double jeopardy, it must be possible to violate one statute without violating the other." (citation omitted)).

¶18 The State may use Hunt's single course of conduct to prove both offenses because we consider only the elements of the offenses, not the "particular facts," in determining whether offenses are "the same" for double jeopardy purposes. *See Ortega*, 220 Ariz. at 324, ¶ 9; *see also Anderjeski v. City Court of Mesa*, 135 Ariz. 549, 550 (1983) (rejecting double jeopardy challenge to defendant's multiple convictions under separate driving under the influence of intoxicating liquor statutes because the statutes described distinct offenses even though the charges arose from a single incident). Multiple convictions arising from the same course of conduct must be sentenced concurrently, and the court did so here. *See* A.R.S. § 13-116 (2010) (requiring concurrent sentences for a single "act or omission which is made punishable in different ways by different sections of the laws"). Therefore, Hunt was not punished twice for the same offense, and his convictions do not violate double jeopardy protections.

CONCLUSION

¶19 For the foregoing reasons, we affirm Hunt's convictions and sentences.



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