

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

ARTURO PENA, *Appellant*.

No. 1 CA-CR 19-0623
FILED 9-29-2020

Appeal from the Superior Court in Maricopa County
No. CR2019-001159-001
The Honorable Ronee Korbin Steiner, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael O'Toole
Counsel for Appellee

Mayes Telles PLLC, Phoenix
By David Paul Lish, Mark Mendoza
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Kent E. Cattani and Judge Cynthia J. Bailey joined.

H O W E, Judge:

¶1 Arturo Pena appeals his convictions and sentences for drive-by shooting and aggravated assault. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 During a “road rage” incident, Pena shot another driver through the back of his neck. The driver survived and the State charged Pena with drive-by-shooting and aggravated assault. The State also alleged six aggravating circumstances.

¶3 Following a trial, Pena was convicted of both offenses and defense counsel stipulated to two of the six aggravating circumstances: that the offenses involved the infliction or threatened infliction of serious physical injury and that the offenses caused physical, emotional, or financial harm to the victim. The court engaged Pena in a brief colloquy to ensure that he had properly waived his right to the jury determining whether the State had proved the aggravating circumstances beyond a reasonable doubt. At sentencing, the court imposed a mitigated prison term for the drive-by shooting conviction and a concurrent presumptive term for the aggravated assault conviction. Pena timely appealed.

DISCUSSION

¶4 Pena argues that the trial court improperly gave weight to the aggravating circumstances that he stipulated to because it conducted an incomplete colloquy. He also argues that insufficient evidence supports the court’s determination that the offenses involved the infliction of serious physical injury. He asserts that he was prejudiced because had the court not considered those two aggravating circumstances, he would have received a more lenient sentence. Because he did not object at trial, Pena must establish fundamental error, which requires him to prove either error and resulting prejudice, or that the error “was so egregious that he could not

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possibly have received a fair trial.” *State v. Escalante*, 245 Ariz. 135, 140, 142 ¶¶ 12, 21 (2018).

¶5 Because the trial court did not impose an aggravated sentence, Pena’s arguments are moot. A trial court may consider aggravating circumstances not proved beyond a reasonable doubt when imposing a presumptive or mitigated sentence. *See State v. Miranda-Cabrera*, 209 Ariz. 220, 227 ¶¶ 31–32 (App. 2004) (resentencing not required when consideration of aggravating circumstances did not result in an aggravated sentence). Therefore, even if we assume that Pena’s stipulation was invalid, the trial court could still consider those aggravating circumstances when sentencing Pena to a mitigated or presumptive prison term. *See id.*

¶6 Further, Pena cannot establish prejudice because his arguments are speculative. *See State v. Munninger*, 213 Ariz. 393, 397 ¶ 14 (App. 2006) (defendant’s speculation that the trial court would impose a specific sentence if it had not considered an aggravating factor does not show prejudice). Here, Pena speculates that, absent his stipulation, the State could not have proved those two aggravating circumstances beyond a reasonable doubt and that the court would have imposed a more lenient sentence. Pena failed to establish fundamental error.

CONCLUSION

¶7 For the foregoing reasons, we affirm.



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