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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 08-0542  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
MIGUEL ANGEL GARFIAS-ORTEGA, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR2004-022854-001 DT

The Honorable Linda A. Akers, Judge

**AFFIRMED**

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Terry Goddard, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
And Katia Mehu, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
By Louise Stark, Deputy Public Defender  
Attorneys for Appellant

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**S W A N N**, Judge

¶1 Miguel Angel Garfias-Ortega ("Defendant") appeals from his convictions and sentences for two counts of armed robbery, violations of A.R.S. § 13-1904 and class two felonies. For the reasons set forth below, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 In June 2004, three men were changing a car tire on the side of a highway when they were approached by two strangers and robbed at gunpoint. In connection with that incident, Defendant was indicted for one count of armed robbery of N.E., one count of armed robbery of J.C., and one count of attempted armed robbery of R.H.

¶3 The case proceeded to trial in August 2006. The jury found Defendant guilty of armed robbery of N.E. and guilty of armed robbery of J.C., but not guilty of attempted armed robbery of R.H. The jury found that each of the armed robbery offenses were dangerous offenses. Although the State had formally alleged several aggravating factors before trial, no aggravating factors were submitted to the jury.

¶4 Sentencing, delayed by numerous intervening proceedings, took place in June 2008. At the sentencing hearing, the court entered judgment on the jury's verdicts and gave the parties an opportunity to speak. The prosecutor argued that although no aggravating factors were proved to the jury, at

trial "the court acknowledged through the testimony and also presentation of the evidence . . . the presence of an accomplice and also that there were two victims." Defense counsel requested that a mitigated sentence be imposed based on Defendant's age, lack of prior felony convictions, and mental health issues.

¶15 After allowing Defendant to speak on his own behalf, the court stated:

[T]he court finds that probation is not appropriate or available under the law. The court has considered these mitigating circumstances, the defendant's lack of prior criminal record. I do not consider his age to be a mitigating circumstance, not his age now or his age then. I will consider mental health issues as a mitigating circumstance.

I've also considered these aggravating circumstances, presence of an accomplice, multiple victims, emotional harm to the victims, the fact that the defendant's vehicle was used to facilitate the commission of the offense.

And based on his statements here today, as well as his statements in the pre-sentence report, there is certainly a lack of remorse as it relates to this offense.

The court finds the aggravating circumstances are sufficiently substantial to warrant an aggravating sentence. Accordingly, as to both counts the court finds an aggravated sentence is appropriate . . . .

The court imposed aggravated sentences of fifteen years of imprisonment for each armed robbery count, to be served concurrently. Defendant was given credit for his presentence incarceration.

¶6 Defendant timely appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A).

#### DISCUSSION

¶7 The issues before us relate only to the use of aggravating factors at sentencing. Because Defendant did not object at sentencing, we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005); *State v. Munniger*, 213 Ariz. 393, 396, 142 P.3d 701, 704 (App. 2006). 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." *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607 (citations omitted). It is Defendant's burden to establish both that fundamental error exists and that it caused him prejudice. *Id.* at ¶ 20.

¶8 On appeal, Defendant contends that his sentence must be vacated because the court improperly found his lack of remorse to be an aggravating factor. Before reaching Defendant's argument, however, we must address the State's concession on appeal that the court committed fundamental error by finding aggravating factors in the absence of a prior

conviction, admission, or jury finding of at least one aggravating factor.<sup>1</sup>

**I. The court was permitted to find aggravating factors.**

¶9 The Sixth and Fourteenth Amendments to the United States Constitution require that “[o]ther than the fact of a prior conviction, any fact [not admitted by the defendant] 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 v. New Jersey*, 530 U.S. 466, 490 (2000); accord *Blakely v. Washington*, 542 U.S. 296, 305 (2004). Under Arizona’s sentencing scheme, “the existence of a single aggravating factor exposes a defendant to an aggravated sentence.” *State v. Martinez*, 210 Ariz. 578, 585, ¶ 26, 115 P.3d 618, 625 (2005). Once a defendant is exposed to an aggravated sentence, the court has discretion to determine the appropriate sentence within the available range. *Id.* “Therefore, once a jury finds or a defendant admits [to] a single aggravating factor, the Sixth Amendment permits the sentencing judge to find and consider additional factors relevant to the imposition of a sentence up to the maximum

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<sup>1</sup> In his opening brief, Defendant does not contend that the court was not permitted to find aggravating factors. The State raises the issue of its own accord in its answering brief, arguing that the court committed fundamental error but the error was not prejudicial. Defendant did not file a reply brief.

prescribed in that statute." *Id.* Pursuant to *State v. Schmidt*, the crucial "first factor" must be a factor that is specifically enumerated in the aggravation statute (currently A.R.S. § 13-701(D) (2010))<sup>2</sup> - it cannot be a factor that is encompassed by the "catch-all" provision of that statute. 220 Ariz. 563, 566, ¶¶ 10-12, 208 P.3d 214, 217 (2009). In the absence of a prior conviction, an admission, or a jury finding of at least one statutorily enumerated aggravating factor, the court's use of additional aggravating factors constitutes fundamental error. *Henderson*, 210 Ariz. at 568, ¶ 25, 115 P.3d at 608.

¶10 Here, Defendant had no prior convictions, he did not admit to any aggravating factor, and the jury found no statutorily enumerated aggravating factor. Therefore, the court committed fundamental error by considering additional factors.

¶11 To prevail on appeal, however, Defendant must also demonstrate prejudice. He must show that "a reasonable jury, applying the appropriate standard of proof, could have reached a different result than did the trial judge." *Id.* at 569, ¶ 27, 115 P.3d at 609. "Whether a defendant can make that showing depends upon the facts of his particular case." *Id.* at ¶ 28.

¶12 Because the existence of a single aggravating factor would expose Defendant to aggravated sentences, to prevail on

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<sup>2</sup> We cite the current versions of statutes when no revisions material to our decision have since occurred.

appeal Defendant must demonstrate prejudice regarding each court-found factor that could expose him to aggravated sentences. See *Martinez*, 210 Ariz. at 585, ¶ 26, 115 P.3d at 625. The court found five aggravating factors: (1) the presence of an accomplice, (2) the victims' emotional harm, (3) the multiplicity of victims, (4) the fact that Defendant's vehicle was used to facilitate the commission of the offense, and (5) Defendant's lack of remorse. Of these five factors, only the presence of an accomplice and the victims' emotional harm are specifically enumerated in the aggravation statute. See A.R.S. § 13-701(D). Under *Schmidt*, therefore, only these two factors had the potential to expose Defendant to aggravated sentences.

¶13 We find that Defendant has failed to meet his burden to show prejudice regarding the accomplice factor. N.E. and J.C. each testified that on the night of the robberies, they were approached by two men.<sup>3</sup> Defendant's co-defendant, who had entered a plea of guilty to the same offenses, testified that Defendant did not participate in the robberies. The co-defendant was impeached, however, by an audiotape recording of his interview with police. In the tape, the co-defendant stated that he and Defendant had acted together to rob the victims.

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<sup>3</sup> R.H. did not testify.

Defendant's theory of defense was that the robberies were committed outside of his presence by the co-defendant and an unknown person.

¶14 On this record, no reasonable jury could both convict Defendant and simultaneously find that an accomplice was not present. Indeed, Defendant's own theory of the case concedes the point that the robbery was committed by two persons. The court's consideration of the presence of an accomplice as an aggravating factor therefore did not prejudice Defendant.<sup>4</sup> Because the court's consideration of that factor did not constitute reversible error, its consideration of additional aggravating factors does not require reversal.

**II. The court's consideration of improper factors did not constitute reversible error.**

¶15 "Ordinarily, if an element is not specified [in the aggravation statute], it may not be used to aggravate a sentence because 'to enhance punishment, in the absence of any legislative intent, by using the very elements of the crime as aggravating factors' would undermine 'the carefully structured statutory scheme providing for presumptive sentences.'" *State v. Tschilar*, 200 Ariz. 427, 339, ¶ 33, 27 P.3d 331, 435 (App.

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<sup>4</sup> We reject Defendant's contention on appeal that the presence of an accomplice here could be a mitigating rather than an aggravating factor. Nothing in the record suggests that the trial court abused its discretion in giving this factor the effect of a statutory aggravator.



2001) (citation omitted). Pursuant to A.R.S. § 13-701(D)(9), the court was entitled to consider the victims' emotional harm as an aggravating factor.<sup>5</sup> Additionally, pursuant to the "catch-all" provision of the statute, the court was entitled to consider the multiplicity of victims as an aggravating factor. *State v. Glassel*, 211 Ariz. 33, 57-58, ¶ 103, 116 P.3d 1193, 1217-18 (2005); *Tschilar*, 200 Ariz. at 435-36, ¶ 34, 27 P.3d at 339-40.

¶16 The court was not, however, entitled to consider Defendant's lack of remorse as an aggravating factor. A defendant's failure to express remorse is usually nothing more than a refusal to admit guilt. *State v. Hardwick*, 183 Ariz. 649, 656, 905 P.2d 1384, 1391 (App. 1995). Such a refusal is irrelevant for sentencing purposes and its consideration as an aggravating factor usually will violate the defendant's Fifth Amendment privilege against self-incrimination. *Id.*

¶17 Nor was the court entitled to consider as an aggravating factor the fact that Defendant's vehicle was used to facilitate the commission of the offenses. That circumstance is not specifically enumerated in A.R.S. § 13-701(D), and it was

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<sup>5</sup> We reject Defendant's contentions on appeal that the emotional harm suffered by the victims was "not horrendous." There was easily sufficient evidence from which the court could reasonably have found by a preponderance of the evidence both the existence and the aggravating nature of the victims' emotional harm.

not here captured by the "catch-all" provision of subsection (D)(24), which provides that the court may consider "[a]ny other factor that the state alleges is relevant to the defendant's character or background or to the nature or circumstances of the crime." The fact that Defendant's vehicle was used to facilitate the armed robberies was relevant only to his guilt - it did not amplify Defendant's culpability.

¶18 A court's consideration of improper aggravating factors is error, but it is not always fundamental error. See *Munninger*, 213 Ariz. at 397, ¶¶ 12-13, 142 P.3d at 705. In *Munninger*, we held that the defendant did not receive an illegal sentence, and the court therefore did not commit fundamental error, when an aggravated sentence within the applicable range was imposed and an aggravated sentence clearly would have been imposed even if the improper factor had not been used. *Id.* at ¶ 12. We further held that a defendant cannot demonstrate prejudice merely by speculating that he would have received a lesser sentence if the improper factor had not been considered. *Id.* at ¶ 14. Here, it is clear that the court would have imposed an aggravated sentence without reference to Defendant's use of his vehicle or refusal to admit guilt.

¶19 Defendant's fifteen-year sentences were within the aggravated range prescribed for armed robbery,<sup>6</sup> and Defendant cannot prevail under fundamental error review because on this record he cannot demonstrate prejudice.

**CONCLUSION**

¶20 For the reasons set forth above, we affirm.

/s/

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PETER B. SWANN, Judge

CONCURRING:

/s/

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PATRICIA K. NORRIS, Presiding Judge

/s/

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DANIEL A. BARKER, Judge

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<sup>6</sup> Armed robbery is a class two felony. A.R.S. § 13-1904. When, as here, a defendant has no prior felony convictions and is found guilty of a dangerous class two felony, the presumptive sentence is ten and a half years of imprisonment and the maximum aggravated sentence is twenty-one years of imprisonment. A.R.S. § 13-704(A).