DIVISION ONE
FILED: 01/20/2011
RUTH WILLINGHAM, ACTING CLERK
BY: GH

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

| | | |
|---|---|---|
| STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>MICHAEL JOHN GRAHAM,<br><br>Appellant. | ) | No. 1 CA-CR 08-1054<br><br>DEPARTMENT E<br><br>**MEMORANDUM DECISION**<br>(Not for Publication – Rule 111, Rules of the Arizona Supreme Court) |

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-112990-001 DT

The Honorable Cathy M. Holt, Judge

**AFFIRMED**

---

Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Angela Corinne Kebric
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

---

**S W A N N**, Judge

**¶1** Michael John Graham ("Defendant") appeals from his commitment for fifty years to the Arizona State Hospital under the jurisdiction of the Psychiatric Security Review Board ("PSRB"). The trial court determined that Defendant was guilty except insane on four counts of aggravated assault and one count of resisting arrest. Defendant argues that the court abused its discretion by applying A.R.S. § 13-708 (2001)[1] to determine the period of his confinement for treatment. For reasons set forth below, we find no abuse of discretion and affirm the trial court's order.

*FACTS[2] AND PROCEDURAL HISTORY*

**¶2** On April 29, 2005, Defendant made derogatory comments while standing behind a couple and their two children as the family ordered food at a fast-food restaurant. The victims attempted to ignore Defendant and sat down to eat. Defendant continued to make derogatory comments, and then pulled out a knife and pointed it at the four family members. The police were called, and after a brief struggle arrested Defendant.

---

[1] A.R.S. § 13-708 was amended in 2007 (2007 Ariz. Sess. Laws, ch. 20, § 1 (1st Reg. Sess.)) and renumbered as § 13-711 in 2008 (2008 Ariz. Sess. Laws, ch. 301, § 27 (2d Reg. Sess.)). We apply the law as it existed at the time of the offense.

[2] On appeal, we view the facts in the light most favorable to sustaining the convictions. *State v. Haight-Gyuro*, 218 Ariz. 356, 357, ¶ 2, 186 P.3d 33, 34 (App. 2008).

**¶3** On May 10, 2005, the state charged Defendant with two counts of aggravated assault with a deadly weapon involving the parents (Counts 1 and 2, Class 3 dangerous felonies); two counts of aggravated assault with a deadly weapon involving the children[3] (Counts 3 and 4, Class 2 dangerous felonies and dangerous crimes against children); and one count of resisting arrest (Count 5, a Class 6 felony).

**¶4** Before trial, Defendant was granted an evaluation of his mental capacity by an independent expert pursuant to A.R.S. § 13-502(B). On February 28, 2006, Defendant waived his right to a jury trial and submitted his case to the trial court for a determination of guilt based upon the police reports and the medical reports evaluating his mental capacity at the time of the offenses. On March 10, 2006, pursuant to A.R.S. § 13-502(D), the trial court found Defendant guilty except insane as to each offense charged.

**¶5** The length of the PSRB's jurisdiction over Defendant, the subject of this appeal, became the subject of three separate court orders. The minute entry from the March 10 hearing placed Defendant under the jurisdiction of the PSRB "for a period equal to the presumptive term for each offense committed by the Defendant." However, the minute entry also made reference to a

[3] Each child was under the age of fifteen. A.R.S. § 13-604.01 (2005 Ariz. Sess. Laws, ch. 188, § 2 (1st Reg. Sess.).

separate order signed by the court on March 2 (not filed until March 10), placing Defendant under the jurisdiction of the PSRB "for 3.5 years, the length equal to the sentence [Defendant] could have received pursuant to [A.R.S.] § 13-604 without enhancements."

**¶6** On October 4, 2006, the Chair of the PSRB wrote the trial judge a letter requesting clarification, noting that the court's order failed to state the "beginning date, length and ending date of the board's jurisdiction over the person," as required by A.R.S. § 13-3994(D). Responding in a minute entry order dated March 6, 2007, the trial court referred the matter to Commissioner Randy Ellexson "for scheduling of a hearing to complete sentencing."

**¶7** The state then filed a "Motion to Correct Minute Entry and Determine Sentencing End Date" in which it stated that the actual end date for each offense should be at the expiration of the presumptive term from the date of sentence on March 10, 2006. The state's motion also pointed out that, even if the court imposed concurrent sentences on the other offenses, A.R.S. § 13-604.01(K) required that the sentences for Counts 3 and 4, as dangerous crimes against children, run consecutive to the sentences imposed for each other and for the other counts.

**¶8** At a hearing held on March 28, 2007, Commissioner Ellexson noted that "when the sentence was originally imposed"

the trial court "did not indicate that [the sentences] were anything other than consecutive sentences." He also noted that the trial court had not expressly declared the sentences were to run concurrently, as would have been required by A.R.S. § 13-708. Therefore, based on a consecutive presumptive sentence for each offense[4] and the initial sentencing date in March 2006, Commissioner Ellexson determined that the end date for Defendant's confinement was February 26, 2056. Defense counsel did not object.

**¶9** On December 3, 2008, Defendant filed a delayed notice of appeal.[5] This court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033.

*DISCUSSION*

*I. Applicability of A.R.S. § 13-708*

**¶10** Defendant argues that A.R.S. § 13-708 does not apply to a confinement order following a guilty except insane verdict, and that therefore Commissioner Ellexson erred by applying it to impose consecutive terms of confinement. Because Defendant failed to raise this objection before the trial court, we review

[4] The court imposed the following presumptive sentences, which defendant does not challenge: Count 1, 7.5 years; Count 2, 7.5 years; Count 3, 17 years; Count 4, 17 years; and Count 5, 1 year.

[5] The trial court granted defendant's request to file a delayed notice of appeal on November 13, 2008, based on defendant's petition for post-conviction relief.

only for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). The imposition of an illegal sentence constitutes fundamental error. *State v. Thues*, 203 Ariz. 339, 340, ¶ 4, 54 P.3d 368, 369 (App. 2003).

**¶11** A trial court has broad discretion in sentencing, and we will not disturb a sentence that is within the statutory limits, absent a clear abuse of discretion. *State v. Ward*, 200 Ariz. 387, 389, ¶ 5, 26 P.3d 1158, 1160 (App. 2001). Because the issue involves interpretation of statutes, we review the court's ruling de novo. *State v. Jensen*, 193 Ariz. 105, 107, ¶ 16, 970 P.2d 937, 939 (App. 1998). In interpreting statutes, we employ sensible constructions that further the legislative purpose. *State v. Clary*, 196 Ariz. 610, 612, ¶ 9, 2 P.3d 1255, 1257 (App. 2000). An unambiguous statute should be interpreted to mean what it plainly states unless an absurdity would result. *U.S. Parking Sys. v. City of Phoenix*, 160 Ariz. 210, 211, 772 P.2d 33, 34 (App. 1989).

**¶12** A.R.S. § 13-3994(A) states that "[a] person who is found guilty except insane pursuant to section 13-502 shall be committed to a secure state mental health facility under the department of health services for a period of treatment." Section 13-502(D) provides:

> If the finder of fact finds the defendant guilty except insane, the court shall determine the sentence the defendant could

> have received pursuant to § 13-703, subsection A or § 13-707 or the presumptive sentence the defendant could have received pursuant to § 13-604, § 13-604.01, 13-701, subsection C, § 13-710 or § 13-1406 if the defendant had not been found insane, and the judge shall commit the defendant pursuant to § 13-3994 *for that term*.

(Emphasis added.) Under the plain language of § 13-502(D), the term of confinement of a defendant who is found guilty except insane must be equal to the actual sentence that defendant would otherwise have received had he not been found insane, even though a "term of confinement" within a mental health facility is not *per se* a "sentence of imprisonment" within a correctional facility. Therefore a defendant who but for his insanity could be sentenced to consecutive sentences can be confined accordingly under the plain language of § 13-502(D). The reference in § 13-502(D) to § 13-604.01[6], which mandates consecutive sentences for certain offenses, further demonstrates that the legislature intended to authorize consecutive terms of confinement. Nothing in the language of § 13-502(D) suggests the contrary.

**¶13** Section 13-708 provides that "if multiple sentences of imprisonment are imposed on a person at the same time . . . the sentence or sentences imposed by the court shall be run

[6] A.R.S. § 13-604.01(K), which was renumbered as A.R.S. § 13-604.01(L) in 2007 (2007 Ariz. Sess. Laws, ch. 248, § 2 (1st Reg. Sess.)).

consecutively unless the court expressly directs otherwise, in which case the court shall set forth on the record the reasons for its sentence." Defendant argues that because § 13-708 refers to "sentences of imprisonment" it cannot apply to terms of confinement, which are not "sentences." This logic is belied, however, by the fact that § 13-502 predicates the terms of confinement precisely on the otherwise applicable prison sentences.

**¶14** In *Ward*, 200 Ariz. at 389, ¶ 7, 26 P.3d at 1160, we found that a trial court had discretion to impose consecutive terms of commitment when consecutive sentences would have been appropriate had the defendant been sentenced to prison instead. We also noted that, because § 13-708 did not impose any restrictions on a court's discretion to choose between consecutive or concurrent sentences, it was immaterial that the statute is not specifically referenced in § 13-502(D). *Id.* at 388-89, ¶ 4, 26 P.3d at 1159-60.

**¶15** Defendant relies on the reasoning of *State v. Bomar*, 199 Ariz. 472, 19 P.3d 613 (App. 2001), and *State v. Heartfield,* 196 Ariz. 407, 998 P.2d 1080 (App. 2000), to support his argument that § 13-708 is inapplicable here because "confinement" is not a "sentence". *Bomar* deals with credit for presentence incarceration and *Heartfield* deals with restitution orders. Neither case addresses the statutorily authorized term

of confinement for a defendant found guilty except insane. The reasoning of *Bomar* and *Heartfield* is therefore not relevant here. Therefore it was not error for Commissioner Ellexson to apply § 13-708 and impose consecutive presumptive terms of confinement to calculate the end date of the PSRB's jurisdiction.

*II. Sufficient Investigation*

**¶16** Defendant next argues that Commissioner Ellexson abused his discretion by failing to conduct an adequate investigation into the relevant facts before imposing the PSRB's end date jurisdiction. He maintains that Commissioner Ellexson should have asked Judge Holt, the trial judge who issued the March 10 orders, to clarify her intent before he imposed consecutive terms of confinement.

**¶17** We will not reduce a sentence that is within statutory limits unless it clearly appears that the sentence was an abuse of the trial court's discretion. *State v. Stotts*, 144 Ariz. 72, 87, 695 P.2d 1110, 1125 (1985). We will not find an abuse of discretion in sentencing unless the decision is characterized by arbitrariness, capriciousness, or failure to conduct an adequate investigation into the relevant facts. *State v. Blanton*, 173 Ariz. 517, 519, 844 P.2d 1167, 1169 (App. 1992). We find no abuse of discretion here.

**¶18** Judge Holt's March 10 minute entry order states that Defendant is to be confined "for a period equal to the presumptive term *for each offense* committed by the Defendant." (Emphasis added.) Commissioner Ellexson's ruling interprets the language of Judge Holt's ruling in accordance with A.R.S. § 13-708, noting it contains no indication "that those [sentences] were anything other than consecutive sentences." His review of Judge Holt's prior order was an adequate investigation of the case, and his conclusion that Judge Holt intended consecutive sentences is reasonable. *See State v. Ramirez*, 178 Ariz. 116, 128, 871 P.2d 237, 249 (1994) (a trial court is presumed to know and follow the law).

**¶19** Regarding the discrepancy between the period of confinement noted in the order signed on March 2, 2006, and the March 10 minute entry, we find that the "3.5 year" term recited in the March 2 order is clearly an error, since it falls outside the range of legally allowable terms of confinement in this case. None of the five offenses in this case have a 3.5 year presumptive term. We find no need to remand this matter for further re-determination.

*CONCLUSION*

**¶20** For the reasons stated above, we affirm the trial court's order of March 28, 2007.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SHELDON H. WEISBERG, Judge