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DIVISION ONE  
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RUTH WILLINGHAM,  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 09-0662  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
SANTIAGO FIDEL SANCHEZ, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Mohave County

Cause No. CR-2008-0181

The Honorable Lee Frank Jantzen, Judge

**AFFIRMED**

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G E M M I L L, Judge

¶1 Santiago Fidel Sanchez was convicted by a jury on one count of drive-by shooting, a class 2 felony; three counts of discharge of a weapon at a structure, each a class 3 felony; and one count of misconduct involving weapons (prohibited

possessor), a class 4 felony. The jury further found the sentence enhancement allegations that the offenses were committed while on pretrial release and to assist, promote or further the interests of a criminal street gang to be proven. At sentencing, the State established that Sanchez had two historical felony convictions and the trial court sentenced him as a repetitive offender to concurrent and consecutive terms of imprisonment totaling thirty-eight years.

¶12 On appeal, Sanchez argues that the trial court erred by denying his motion for continuance, failing to preclude late disclosed photographs, allowing the jury to return inconsistent verdicts, and imposing consecutive sentences. For reasons that follow, we affirm.

## DISCUSSION

### A. *Motion for Continuance.*

¶13 Sanchez intended to present expert testimony at trial on gangs and gang activity. After his witness failed to appear as scheduled on the last day of trial, Sanchez requested a one-day continuance to attempt to locate the witness. Sanchez argues that the trial court erred in denying his request. We will not reverse a trial court's denial of a motion for continuance during trial unless abuse of discretion and prejudice are clearly established. *State v. Mauro*, 159 Ariz. 186, 200, 766 P.2d 59, 73 (1988).

¶14 When informed of the failure of the witness to appear on the morning of the last day of trial, the trial court recessed the trial to give defense counsel time to contact the witness and determine when he would be available. Defense counsel informed the trial court that the voice mail for the witness's telephone number indicated it was full and that counsel could not leave a message, but that he would continue to make efforts to contact him. After lunch, defense counsel explained to the trial court that an investigator had gone by the witness's office, but that the witness was not there. Defense counsel further stated he had obtained the home telephone number for the witness but calls to that number were not answered. Defense counsel acknowledged that he had no idea where the witness was and could not offer any assurances that the witness would appear the following day. The trial court ruled that in the absence of any contact with the witness there was no basis for further delay. The defense then rested and the trial proceeded to closing argument without testimony from the witness.

¶15 We find no abuse of discretion by the trial court. Sanchez did not subpoena the witness. This failure alone is sufficient to justify denial of the motion for continuance. *State v. Blodgett*, 121 Ariz. 392, 395, 590 P.2d 931, 934 (1979). Furthermore, the trial court did give Sanchez an

opportunity to determine if the witness would appear in a timely manner. When no contact could be made with the witness and no assurances could be offered that the witness would appear the following day, the trial court could reasonably conclude that granting an additional continuance would not be productive. This conclusion is supported by the fact that in neither his motion for new trial raising the denial of the continuance nor his brief on appeal does Sanchez offer any explanation for the witness's non-appearance or make any claim that the witness would have been available if an additional continuance had been granted. There was no error in the denial of the motion for continuance. *State v. Reyes*, 99 Ariz. 257, 266, 408 P.2d 400, 406 (1965).

*B. Motion to Preclude Photographs*

¶16 Sanchez next contends the trial court erred in denying his motion to preclude late disclosed photographs. The various photographs sought to be precluded depict Sanchez with a shotgun and "throwing gang signs." Noting that other photographs had been disclosed by the State months earlier, Sanchez argued that the newly disclosed photographs should be precluded because the disclosure was untimely. The trial court denied the motion on the grounds that there was no prejudice to Sanchez from the late disclosure.

¶17 Arizona Rule of Criminal Procedure 15.1(c) states:

Unless otherwise ordered by the court, the prosecutor shall disclose the materials and information listed in Rule 15.1(b) not later than. . . 30 days after arraignment.

Rule 15.1(b)(5) includes:

(5) A list of all papers, documents, photographs or tangible objects that the prosecutor intends to use at trial or which were obtained from or purportedly belong to the defendant. . . .

Rule 15.6 further imposes a continuing duty to disclose. If the trial court learns of a party's violation of discovery rules, it "shall impose any sanction it finds appropriate" under the circumstances. Ariz. R. Crim. P. 15.7(a). Sanctions the trial court may impose include, but are not limited to, granting a continuance, declaring a mistrial, or preclusion of evidence. *Id.*

¶18 The decision whether to impose sanctions and the choice of sanctions for a disclosure violation is within the sound discretion of the trial court. *State v. Stewart*, 139 Ariz. 50, 59, 676 P.2d 1108, 1117 (1984). In deciding whether to impose sanctions for a disclosure violation, the trial court should consider (1) the importance of the evidence, (2) surprise or prejudice to the other party, (3) whether the lack of disclosure was in bad faith, and (4) any other relevant circumstances. *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996). Preclusion is rarely an appropriate sanction

for a disclosure violation, and the trial court should apply sanctions so as to have minimal effect on the evidence and merits of the case. *Id.* "Denial of a sanction is generally not an abuse of discretion if the trial court believes the defendant will not be prejudiced." *Id.*

¶19 Here, the disclosure of the photographs occurred nearly a month prior to trial and well before the final deadline for disclosure. See Ariz. R. Crim. P. 15.6(c) (setting deadline for final disclosure as seven days prior to trial). Although disclosure of the photographs should have occurred earlier, the prosecutor explained the circumstances behind their untimely disclosure and there was no evidence of bad faith on the part of the State. Moreover, the photographs were clearly relevant to the charges against Sanchez. Finally, Sanchez was already familiar with the photographs as they were pictures of him obtained from a computer in his residence and there was no claim of prejudice from the timing of the disclosure. On this record, we cannot conclude the trial court abused its discretion in not precluding the photographs.

*C. Inconsistent Verdicts*

¶10 In addition to the counts on which he was convicted, Sanchez was charged with one count of misconduct involving weapons (interests of a street gang) in violation of Arizona Revised Statutes (A.R.S.) section 13-3102(A)(9) (Supp. 2007).

The jury acquitted Sanchez on this count. During the aggravation phase of the trial, however, the jury found that the State had proven the allegation that the offenses on which Sanchez had been convicted were committed "with the intent to promote, further or assist any criminal conduct by a criminal street gang." Based on the jury's verdict on the gang motivation enhancement allegation, the trial court sentenced Sanchez to enhanced terms of imprisonment in accordance with A.R.S. § 13-604(T) (Supp. 2007), which mandates that his sentences be increased by three or five years depending on the felony classification.

¶11 Sanchez contends the verdict on the gang motivation enhancement allegation should be vacated because the verdict is inconsistent with his acquittal on the misconduct involving weapons (interests of a street gang) count.<sup>1</sup> A person commits the offense of misconduct involving weapons (interest of a street gang) "by knowingly . . . [d]ischarging a firearm at an occupied structure in order to assist, promote or further the interests of a criminal street gang." A.R.S. § 13-3102(A)(9).

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<sup>1</sup> In the heading to this claim of error, Sanchez includes as an additional issue whether sufficient evidence was presented at the aggravation hearing to justify the enhancement. Because this issue is not developed in the body of his brief, it has been waived on appeal. *State v. Walden*, 183 Ariz. 595, 605, 905 P.2d 974, 984 (1995), *overruled on other grounds by State v. Ives*, 187 Ariz. 102, 108, 927 P.2d 762, 768 (1996).

Sanchez argues that because this offense contains only one more element than the offenses of drive-by shooting, A.R.S. § 13-1209(A) (Supp. 2007), and discharging a firearm at a structure, A.R.S. § 13-1209(A) (Supp. 2007), *i.e.*, to assist, promote or further the interests of a street gang, the acquittal on this offense requires the conclusion that the jury determined that the other offenses arising from the drive-by shooting were likewise not gang related.

¶12 The verdicts on the charge of misconduct involving weapons (interest of a street gang) and the gang motivation enhancement are inconsistent, but Arizona follows the majority rule that consistency in verdicts is not required. *State v. Zakhar*, 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969); *see also State v. Eastlack*, 180 Ariz. 243, 258, 883 P.2d 999, 1014 (1994) (no constitutional requirement of consistent verdicts). This rule is based on the idea that inconsistency by jurors in their verdicts "does not show that they were not convinced of the defendant's guilt." *Dunn v. United States*, 284 U.S. 390, 393 (1932). The reference by Sanchez to decisions from other jurisdictions that do not allow inconsistent verdicts to stand is unavailing. As an intermediate appellate court, we are bound by the decisions of our supreme court and do not have the authority to modify or disregard them. *State v. Smyers*, 207 Ariz. 314, 318 n.4, ¶ 15, 86 P.3d 370, 374 n.4 (2004). Thus, we



find no merit to Sanchez's challenge to the gang motivation enhancement.

*D. Consecutive Sentences*

¶13 Sanchez also argues that the trial court erred in ordering the sentence on his conviction for drive-by shooting be served consecutive to his sentences on the three counts of discharge of a weapon at a structure. Citing A.R.S. § 13-116 (2010), Sanchez contends consecutive sentences are improper because all four offenses arose out of the same conduct. This statute states: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." Whether consecutive sentences are permitted under a particular set of facts is reviewed *de novo*. *State v. Roseberry*, 210 Ariz. 360, 370 n.8, ¶ 57, 111 P.3d 402, 412 n.8 (2005).

¶14 Although A.R.S. § 13-116 bars consecutive sentences when a defendant's conduct is a "single act," it does not preclude consecutive sentences for offenses involving multiple victims. *State v. Hampton*, 213 Ariz. 167, 182, ¶ 23, 140 P.3d 950, 965 (2006). In the instant case, the four convictions at issue were based on multiple .45 caliber gunshots and shotgun blasts fired by Sanchez and a co-defendant at a Bullhead City home. The home and several vehicles parked in front of the home

were hit by the gunfire. The drive-by shooting count pertained to the shooting of the home and the three counts of discharge of a weapon at a structure were directed at the shooting of the vehicles. The home was owned by a person different from the owners of the vehicles. Because there were separate victims for the counts of drive-by shooting and discharge of a weapon at a structure, there was no error by the trial court in imposing consecutive sentences. See *State v. White*, 160 Ariz. 377, 379-81, 773 P.2d 482, 484-86 (App. 1989) (consecutive sentences for each offense upheld when single act caused separate criminal result to each of four victims).

**CONCLUSION**

¶15 We affirm Sanchez's convictions and sentences.

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICIA K. NORRIS, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICIA A. OROZCO, Judge