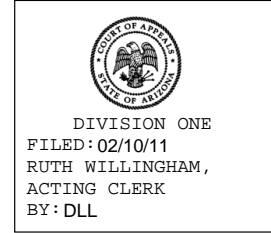


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 09-0783
) 1 CA-CR 09-0784
Appellee,) (Consolidated)
)
v.) DEPARTMENT D
)
SHAWN NELSON MANNING,) **MEMORANDUM DECISION**
) (Not for Publication - Rule
Appellant.) 111, Rules of the Arizona
) Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-048501-001 SE
CR 2007-153667-001 SE

The Honorable Emmet J. Ronan, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Terry J. Adams, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Shawn Nelson Manning appeals from his sentences for burglary in the second degree, a class three felony in violation of Arizona Revised Statutes ("A.R.S.") section 13-1507 (2001),

and theft of means of transportation, a class three felony in violation of A.R.S. § 13-1814 (2001). He argues the superior court should not have sentenced him to aggravated sentences under A.R.S. § 13-702.02 (2001) because a jury did not determine the aggravating circumstances. We disagree and affirm his sentences.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 In August 2007, a grand jury indicted Manning for two class three felonies -- burglary in the second degree and theft of property of \$4000 or more but less than \$25,000. Further, in September 2007, a grand jury indicted Manning for theft of means of transportation. Manning waived his right to a trial by jury, and after a four-day bench trial on the consolidated charges,² the court found Manning guilty of burglary in the second degree, committed on or between August 11 and 16, 2007; the lesser-included offense of theft, a class one misdemeanor, committed on or between August 11 and 16, 2007; and theft of means of transportation, committed on or about August 17, 2007.

¶3 At the sentencing hearing, the court considered evidence on Manning's prior felony convictions and mitigating

¹We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Manning. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

²The court consolidated both cause numbers for trial but not for sentencing.

and aggravating circumstances. After the State's forensic latent print examiner testified at the hearing on Manning's prior convictions, the court found Manning had three prior felony convictions in Florida for offenses committed in 1990.³ The court used these Florida felony convictions as two or more "not historical prior felony convictions as defined in § 13-604" (Supp. 2006) to bring Manning within the enhanced range of A.R.S. § 13-702.02(B)(4) for both of his class three felony offenses. A.R.S. § 13-702.02(B)(4); see *State ex rel. Romley v. Hauser*, 209 Ariz. 539, 541, ¶ 9, 105 P.3d 1158, 1160 (2005) (a prior felony conviction that falls outside the § 13-604 definition of "historical prior felony conviction" may be used for sentence enhancement under § 13-702.02). Under § 13-702.02(B), the presumptive sentence is 6.5 years, and the court may aggravate the sentence up to 13 years pursuant to § 13-702(B)-(D) (Supp. 2006).

¶4 Before sentencing Manning, the court noted it had considered the written presentence report, trial testimony⁴ and

³Manning's Florida felony convictions are as follows: (1) Dealing in Stolen Property, committed on August 31, 1990, and convicted on August 20, 1992, (2) Uttering a Forged Instrument, committed on August 29, 1990, and convicted on August 20, 1992, and (3) Fraudulently Obtaining a Motor Vehicle Title, committed on August 29, 1990, and convicted on August 20, 1992.

⁴During the State's cross-examination, Manning stated he had been arrested and imprisoned in Florida for receiving stolen property and fraud check schemes, had been arrested and

evidence, both the State's and Manning's sentencing memoranda, and correspondence Manning filed. The court then found the following aggravating factors:⁵

The offenses were committed for pecuniary gain. The defendant has a lengthy criminal history. It does appear that much of it is from 15 years ago, but they are all offenses that are similar in nature. Past efforts at probation and other prison terms have not changed the behavior. The Court also [found] that the defendant's conduct caused emotional and financial harm to the victims.

The court found the aggravating factors outweighed the mitigating factor of "strong family support," and sentenced Manning to an aggravated term of 12 years for each class three felony -- to run concurrently -- with 669 days of presentence incarceration credit, and to 180 days for the misdemeanor theft offense with 180 days of presentence incarceration credit.

DISCUSSION

¶15 Manning argues the superior court improperly aggravated his sentences because a jury, not the court, should

imprisoned in Ohio for robbery, and was currently incarcerated in California for "[b]eing accused of being a driver in a bank robbery."

⁵We note the court did not identify the specific authority it relied on for each aggravating circumstance. This makes appellate review very difficult, especially when the court speaks in general terms. Our supreme court has repeatedly encouraged trial courts to indicate the statutory subsection for each aggravating circumstance. See, e.g., *State v. Price*, 217 Ariz. 182, 184 n.3, ¶ 4, 171 P.3d 1223, 1225 n.3 (2007).

have found the aggravating factors beyond a reasonable doubt. As we explain below, we disagree.

¶16 We review for fundamental error because, as Manning concedes, he did not object at trial to the court finding the aggravating factors. Thus, Manning “must establish both that fundamental error exists and that the error in his case caused him prejudice.” *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005).

¶17 Under the Sixth Amendment, a defendant has the right to have a jury determine, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum.”⁶ *State v. Price*, 217 Ariz. 182, 184, ¶ 8, 171 P.3d 1223, 1225 (2007) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435 (2000)). An aggravating circumstance can constitutionally increase a maximum sentence in three ways: first, a jury can find the aggravator beyond a reasonable doubt; second, a defendant can stipulate to relevant facts or consent to judicial fact-finding; and third, either the judge or a jury

⁶ “[T]he statutory maximum sentence for *Apprendi* purposes in a case in which no aggravating factors have been proved to a jury beyond a reasonable doubt is the presumptive sentence established [by statute].” *State v. Martinez*, 210 Ariz. 578, 583, ¶ 17, 115 P.3d 618, 623 (2005).

can find the fact of a prior conviction. *Id.* at 185, ¶ 10, 171 P.3d at 1226.

¶18 For the court to sentence Manning to an aggravated sentence, the State is only required to establish one aggravating circumstance. A.R.S. § 13-702(B). The finding of one *Blakely*-exempt⁷ factor is “enough to allow the trial court to consider other aggravating factors.” *State v. Burdick*, 211 Ariz. 583, 586, ¶ 13, 125 P.3d 1039, 1042 (App. 2005) (citing *State v. Martinez*, 210 Ariz. 578, 585, ¶ 26, 115 P.3d 618, 625 (2005)); see A.R.S. § 13-702(D) (“If the trier of fact finds at least one aggravating circumstance, the trial court may find by a preponderance of the evidence additional aggravating circumstances.”).

¶19 Here, the court cited Manning’s “lengthy criminal history” as one aggravating circumstance. Based on our review of the record, we conclude the court relied, at least in part, on the previously established Florida felony convictions⁸ when listing Manning’s criminal history as an aggravating circumstance.⁹ A finding of prior convictions is a *Blakely*-

⁷*Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

⁸See *supra* note 3 and accompanying text.

⁹Although distinct from the enumerated aggravating circumstance of A.R.S. § 13-702(C)(11), this circumstance would fall within the catch-all of § 13-702(C)(24).

exempt aggravating circumstance. *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403 (2004); see *Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2362-63, 147 L. Ed. 2d 435. Thus, once the court relied on Manning's Florida convictions to find his criminal history as an aggravating circumstance, it could consider any other aggravating circumstances in imposing an aggravated sentence.¹⁰ Accordingly, we hold the superior court's aggravation of Manning's sentences without a jury determination of aggravating circumstances did not constitute fundamental error.

¹⁰The court did not use the catch-all aggravating circumstance as the "sole factor" to increase Manning's sentence because it also relied on the fact that Manning committed the offense for pecuniary gain, A.R.S. § 13-702(C)(6), and that Manning's conduct caused emotional and financial harm to the victims. A.R.S. § 13-702(C)(9). Furthermore, the State timely alleged several aggravating circumstances other than prior convictions, providing Manning with notice that it might use those circumstances to aggravate his sentence. Accordingly, the court's use of aggravating circumstances does not implicate the same concerns that were present in *State v. Schmidt*. See *State v. Schmidt*, 220 Ariz. 563, 566, ¶¶ 8-11, 208 P.3d 214, 217 (2009).

CONCLUSION

¶10 For the foregoing reasons, we affirm Manning's sentences.

/s/

PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Judge

/s/

PATRICIA A. OROZCO, Judge