IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 05/26/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0898
	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION**
NEAL ARTHUR HERRELL, Appellant.	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-048902-001 DT

The Honorable Maria del Mar Verdin, Judge

CONVICTIONS AFFIRMED; REMANDED FOR RESENTENCING

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W I N T H R O P, Judge

¶1 Neal Arthur Herrell ("Defendant"), appeals his convictions and sentences on one count each of possession of marijuana for sale, possession or use of a weapon during the

commission of felony involving drugs, misconduct involving a weapon as a prohibited possessor, and possession of drug paraphernalia. Defendant concedes that he did not raise any of these issues before the trial court, but argues on appeal that the court committed fundamental error when it (1) found he had two prior convictions for sentencing purposes; (2) seated a jury of only eight persons instead of twelve; (3) admitted evidence of his prior convictions during the State's case in chief; and (4) imposed consecutive sentences on the counts for possession of marijuana and possession of a weapon during the commission of a felony drug offense. For reasons set forth below, we affirm Defendant's convictions, but remand for resentencing.

FACTS AND PROCEDURAL HISTORY[1]

¶2 On August 15, 2008, a Phoenix Police Department Special Assignments Unit ("SWAT team") as well as several squads of the Phoenix Police Department Neighborhood Enforcement Team arrived at Defendant's house in Phoenix to serve Defendant with a search warrant and execute a search on the residence. The officers had knowledge ahead of time that there were surveillance cameras posted on the outside of the residence that

[1] We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against Defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

monitored the street; accordingly, they took tactical precautions when approaching the house.

¶3 The SWAT team did a "knock and announce" at the front door of the house, stating "Phoenix Police Department, search warrant." When no one inside the house responded, the SWAT team breached an outer black security door at the front entrance. Employing a four-foot battering ram, the officers next attempted to ram through the deadlock on the wooden front double doors, but were unable to do so after eleven attempts because the door was heavily reinforced with steel strips.

¶4 The wooden doors were eventually opened by John Woodruf, who rented a trailer in Defendant's backyard. Woodruf and Defendant were the only two occupants in the western portion of the house when the SWAT team entered.

¶5 Once inside the house, the officers observed an activated video surveillance monitor.[2] The house had two bedrooms, one on the south and one on the north side. The south bedroom had a child's crib in it and appeared to be largely unused. The officers located no evidence in it.

¶6 The north bedroom, however, contained a bed and a desk, and appeared to the officers to be occupied by Defendant. The room was full of "clutter" and had "bunch[es] of bandanas

[2] Some of the "squares" on the monitor were blacked out because the SWAT team disabled at least one of the outside cameras prior to entry.

hanging from the ceiling, stuff [lying] out on the floor, [and] soda cans and stuff on the desk."[3] The bedroom, which was not very large, was almost entirely filled by the bed. Defendant's cell phone and keys were located on the bed. On the desk immediately next to the bed was a traffic citation made out to Defendant along with a fully-loaded .45 caliber revolver, scales, a small bag of marijuana, a wooden box containing rolling papers and baggies, additional packaging material, and approximately $225 in cash. Inside a closet in the bedroom, officers located a .22 caliber Ruger rifle and magazine and a .22 caliber Remington rifle, as well as a tin containing ten small bags of marijuana and a pill bottle filled with marijuana. On a gun rack affixed to the wall just outside the north bedroom, officers located "five boxes of ammunition for various caliber guns, including a .45 caliber gun, a .22 caliber gun, and a .38 caliber gun."

¶7 On the day he was arrested, Defendant told the officers that he owned the residence and that he and his wife were living there and, specifically, staying in the north bedroom. In all, the officers recovered approximately 130 grams, or slightly less than five ounces, of marijuana from Defendant's residence. To the officers, the amount of drugs and

[3] Defendant was wearing a bandana on his head similar to the ones hanging in the bedroom.

the amount and type of drug paraphernalia involved, as well as the cameras, the weapons, and the cash located at the house indicated that the owner intended to sell the drugs.

¶8 The State charged Defendant with: Count 1, possession of marijuana for sale in an amount less than two pounds, a Class 4 felony; Count 2, misconduct involving a weapon by knowingly using or possessing "a 45 caliber revolver and/or ruger rifle" during the commission of possession of marijuana for sale, a Class 4 felony; Count 3, misconduct involving a weapon for knowingly possessing "a 45 caliber revolver and/or ruger rifle" while being a prohibited possessor, a Class 4 felony; and Count 4, unlawful use or possession of drug paraphernalia ("digital scale, drug paraphernalia, to pack, repack, store, contain, or conceal marijuana"), a Class 6 felony. Defendant denied the charges, and the case went to trial.

¶9 Defendant testified at trial and acknowledged that he owned the residence outright, but maintained that he had not been living there on the day the officers executed the search warrant. According to Defendant, even though he had been present at the house when the police arrived on August 15, he had neither been inside nor slept in the north bedroom for over a week. His wife alone had been occupying the bedroom, and he had been sleeping on the couch in the living room because the two were not getting along. Defendant also testified that his

wife owned the .45 caliber revolver. He believed that the rifles belonged to Woodruf and that Woodruf had given the rifles to his wife as collateral for rent on the trailer that was overdue.

¶10 At the conclusion of the trial, the jury found Defendant guilty of all of the offenses as charged. On December 3, 2009, the trial court sentenced Defendant to presumptive ten year prison terms for the Class 4 felonies with three prior felony convictions on each of Counts 1, 2, and 3; it sentenced Defendant to the presumptive 3.75 year prison term for a Class 6 felony with three prior felony convictions on Count 4. The court ordered that the sentences on Counts 1 and 2 be served consecutively to one another and counts 3 and 4 to be served consecutively with count 2 and each other.

¶11 Defendant timely appealed. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 and -4033(A) (2010).[4]

DISCUSSION

(1) Improper Enhancement/Historical Felony Priors

¶12 Defendant argues that the trial court committed fundamental error when it found that he had three historical

[4] Unless otherwise noted, we cite the current version of the applicable statutes when no revisions material to this decision have since occurred.

prior felony convictions for sentence enhancement purposes. Defendant maintains that one of his prior felonies, attempted trafficking in stolen property, a Class 4 felony, could not be used because it was more than five years old. Defendant also argues that the other prior, criminal trespass, a Class 6 felony, could not be used as a separate felony because it occurred on the "same occasion" as his aggravated assault prior. According to Defendant, he therefore only has one prior historical conviction.

¶13 Defendant did not raise his objections before the trial court, therefore, we need only review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). In a fundamental error review, the burden lies with Defendant to demonstrate both that fundamental error exists and that the error caused him prejudice. *Id*. at 567, ¶ 20, 115 P.3d at 607.

¶14 "Before we [] engage in a fundamental error analysis, [] we must first find that the trial court committed some error. *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991). The improper use of two prior convictions instead of one for purposes of sentence enhancement "constitutes fundamental error" which may be raised for the first time on appeal. *State v. Kelly*, 190 Ariz. 532, 534, ¶ 5, 950 P.2d 1153, 1155 (1997). Here, however, the trial court's finding that Defendant had two

prior felony convictions for sentencing purposes was proper. Therefore, it committed no error, let alone fundamental error, in sentencing Defendant accordingly.

¶15 A conviction occurs when there is a determination of guilt by verdict, finding, or the acceptance of a plea. *State v. Thompson*, 200 Ariz. 439, 441, ¶ 7, 27 P.3d 796, 798 (2001). A historical prior felony conviction is "[a]ny felony conviction that is a third or more prior felony conviction." A.R.S. § 13-105(22)(d) (2010).[5] A trial court must count the prior felony convictions forward, from oldest to newest, when determining the *third* prior felony conviction. *See State v. Decenzo*, 199 Ariz. 355, 358, ¶ 9, 18 P.3d 149, 152 (App. 2001). The focus is on the *conviction* date, not the *commission* date, of the crime. *See State v. Thomas*, 219 Ariz. 127, 130, ¶ 12, 194 P.3d 394, 397 (2008) (relying on the defendant's conviction dates of prior felonies in determining that the defendant's sentence was properly enhanced). Further, once a person has been convicted of three prior felony offenses, the third conviction in time can be used to enhance a later sentence, regardless of the passage

[5] The definitions contained in A.R.S. § 13-105 for "historical prior felony conviction" and "dangerous offense" were not effective until December 31, 2008, several months after the instant crime occurred. Virtually identical definitions were set forth in A.R.S. §§ 8-350 and 13-604 at the time the crime occurred. Accordingly, we cite to the most recent version of § 13-105 throughout this decision.

of time since it was committed. *State v. Garcia*, 189 Ariz. 510, 515, 943 P.2d 870, 875 (App. 1997).

¶16 Defendant's Department of Corrections criminal history summary ("Pen Pak"), in evidence at trial, establishes that Defendant has three prior felony convictions. In chronological order by date of *commission* these consist of: (1) trafficking in stolen property, a Class 4 felony committed on February 4, 1987; (2) aggravated assault, a Class 3 dangerous felony, committed on November 29, 1988; and (3) criminal trespass in the first degree, a Class 6 felony, committed on November 30, 1988. According to the Pen Pak, in chronological order, the dates of *sentencing* for these felonies are: May 8, 1989, criminal trespass and aggravated assault; and February 26, 1993, trafficking in stolen property.[6]

¶17 Defendant admitted to the three prior felony convictions at trial and does not contest their existence on appeal. He merely contests whether two of them lawfully could be used by the trial court for sentencing. We find they could.

¶18 The State asserts that the trafficking conviction was "his third prior felony conviction" in time, regardless of when

[6] The trial court's sentencing minute entry and the State's answering brief list the sentencing date for the assault as May 15, 1989, but the date on the Pen Pak lists the same sentencing date, May 8, 1989, for both the criminal trespass and the aggravated assault offenses.

it was committed, and qualifies as a historical prior felony conviction under § 13-105(22)(d). In making this assertion, the State relies on the trial court's sentencing minute entry, which notes the date of "conviction" for this offense as "March 8, 1993." The official Pen Pak, however, does not contain any information concerning the date of conviction for the trafficking offense. In fact, what information there is in the record does not support the March 8 "conviction" date cited by the court and the State. The Pen Pak shows only that Defendant was "sentenced" for the offense on "February 26, 1993." The State's "Allegation Pursuant to A.R.S. § 13-702.02" asserts that Defendant "was *convicted* for that crime on August 2, 1988," (emphasis added) but contains no documentation that supports its assertion. Therefore, there is nothing in the record before us that confirms the fact that the trafficking offense is in fact the third *conviction* in time and, thus, a historical prior felony conviction under A.R.S. § 13-105(22)(d).

¶19 The Pen Pak, however, does establish that Defendant committed the aggravated assault and trespassing offenses at a later time than he committed the trafficking offense. The Pen Pak also establishes that the aggravated assault offense is a "dangerous" offense.[7] It therefore qualifies as "one" historical

[7] Pursuant to § 13-105(13), a "dangerous offense" is defined as "an offense involving the discharge, use or threatening

prior felony conviction pursuant to A.R.S. § 13-105(13) and (22)(ii)-(iii) regardless of when it was committed.[8]

¶20 The criminal trespassing offense, which Defendant committed after both the trafficking offense and the aggravated assault offense, would become Defendant's third prior felony conviction in time to the offenses in the current case. As the third prior felony conviction, it would not be subject to time limitations but would qualify as Defendant's second historical prior felony pursuant to A.R.S. § 13-105(22)(d). Thus, whether the third *conviction* in time was for the trafficking offense, as the State suggests, or the trespass, as appears more likely, Defendant would nonetheless have two prior historical felony convictions for sentencing purposes.

¶21 Defendant maintains that the criminal trespass offense cannot be counted as one of the two historical prior felony convictions because it was committed on the "same occasion" as the aggravated assault. Convictions for two or more offenses committed on the same occasion may be counted as only one conviction for the purpose of sentencing. *See* A.R.S. § 13-

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exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person."

[8] Sections 13-105(22)(a)(ii)-(iii) provide that a "[h]istorical prior felony conviction" means any offense that "[i]nvolved the intentional or knowing infliction of serious physical injury" or "[i]nvolved the use or exhibition of a deadly weapon or dangerous instrument."

604(M) (2001); *State v. Rasul*, 216 Ariz. 491, 496, ¶ 22, 167 P.3d 1286, 1291 (App. 2007).

¶22 In *State v. Noble*, 152 Ariz. 284, 286, 731 P.2d 1228, 1230 (1987), our supreme court adopted a test for determining whether two offenses were committed "on the same occasion." It looked to see whether (1) a Defendant's criminal conduct was "continuous and uninterrupted;" (2) the criminal conduct was "directed to the accomplishment of a single criminal objective rather than multiple criminal objectives;" (3) "only one person was victimized;" and (4) "the time period involved was very brief." *Id*. The *Noble* test thus "includes an analysis of 1) time, 2) place, 3) number of victims, 4) whether the crimes were continuous and uninterrupted, and 5) whether they were directed to the accomplishment of a single criminal objective." *State v. Kelly*, 190 Ariz. 532, 534, ¶ 6, 950 P.2d 1153, 1155 (1997). There is no all-encompassing test for determining whether two offenses were committed on the same occasion; the determination necessarily turns on the specific facts of this case. *Id*. at 535, ¶ 9, 950 P.2d at 1156.

¶23 In the present case, the record contains the police reports relevant to the 1988 offenses, copies of which were attached to both the State's sentencing memorandum and the presentence report. The police reports indicate that Defendant committed aggravated assault when, at approximately 9:00 p.m. on

November 29, 1988, Defendant became angry and began striking his girlfriend with a "strap" or a "pool cue" while the two of them were in Defendant's home. Defendant was angry and accused his girlfriend of being pregnant with a child that was not his. The assault continued until approximately 8:40 a.m. the following morning, November 30, when the victim was able to escape from the house and seek shelter with her neighbor.

¶24 At approximately 8:45 a.m. on November 30, the police arrived at the scene. The girlfriend had fled to a neighbor's house, and the neighbor told police that Defendant arrived at her home demanding to be admitted. He then pulled the front door of her home open, breaking the chain and causing damage to the door knob. Defendant then entered the neighbor's home carrying a pool cue in an attempt to find his girlfriend, who was in the residence hiding from him. Defendant left after the police were called.

¶25 Applying the *Noble* analysis to the facts of this case, we conclude that the aggravated assault and criminal trespass offenses were not committed on the same occasion. *See Kelly*, 190 Ariz at 534, ¶ 6, 950 P.2d at 1155. First, different persons were victimized here: Defendant's girlfriend, who was assaulted, and the neighbor, whose home was broken into and damaged. Second, Defendant assaulted his girlfriend on the evening of November 29 and committed the criminal trespass at

the neighbor's home sometime before 8:45 a.m. on the morning of November 30. Third, the aggravated assault occurred inside Defendant's home while the criminal trespass occurred at a different location, his neighbor's home. Further, the incidents were not "continuous and uninterrupted" because Defendant's girlfriend interrupted the assault when she succeeded in escaping and hiding from Defendant. Finally, Defendant's conduct was not directed towards "the accomplishment of a single criminal objective." Defendant's first criminal objective was to assault his girlfriend. His second, distinct, criminal objective was to break into his neighbor's home after she refused him entry, which he accomplished by force.

¶26 The aggravated assault offense and the criminal trespass offense were not committed on the same occasion. Therefore, Defendant had three prior felony convictions and the aggravated assault, the trafficking, or the criminal trespass, regardless of which two the trial court actually used, were "historical prior felony convictions."[9] Defendant has, therefore, not shown that the trial court committed any error, let alone fundamental error, in sentencing him with two prior felony convictions. *See Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607; *Lavers*, 168 Ariz. at 385, 814 P.2d at 342.

[9] We will affirm the trial court on appeal if the result is legally correct for any reason. *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

(2) *Eight vs. Twelve Person Jury*

¶27 Defendant argues that the trial court committed fundamental error when it empanelled an eight person jury because he was exposed to a thirty year sentence at trial. This argument is based on Defendant's contention that, in addition to the consecutive sentences the trial court ordered as to Counts 1 and 2, the trial court could also have ordered that the sentences on Counts 2 and 3 be served consecutively. Had the court done so, he would have received a thirty year sentence instead of the twenty year sentence he did receive.

¶28 In *State v. Soliz*, 223 Ariz. 116, 120, ¶ 16, 219 P.3d 1045, 1049 (2009), our supreme court held that, when the State fails to request a twelve-person jury, it effectively waives its ability to obtain a sentence of thirty years or more. The trial judge affirms the State's waiver by failing to empanel a twelve-person jury. *Id*. In such a circumstance, as long as a lesser sentence may legally be imposed for the crimes alleged, a sentence of thirty years or more may no longer be imposed and "the twelve-person guarantee of article 2, Section 23 [of the Arizona Constitution] is not triggered." *Id.* "As a matter of law," the defendant in *Soliz* could not have received a sentence of thirty years or more once the jury of fewer than twelve persons began its deliberations, the supreme court found that

defendant could show no error, let alone fundamental error in his case. *Id*. at ¶ 18, 219 P.3d at 1049.

¶29 In this case, as in *Soliz*, the State requested an eight-person jury, to which the trial court agreed. As a result, Defendant could not have received a sentence of thirty years or more, as a matter of law, and, in fact, received only an effective twenty year sentence because of the stacking on Counts 1 and 2. *Id*. As a result, no error, let alone fundamental error, occurred in this case. *Id.; see also Lavers*, 168 Ariz. at 385, 814 P.2d at 342.

(3) *Admission of Pen Pack, Severance, Juror #4*

¶30 On appeal, Defendant raises several issues together in a cursory fashion. Defendant concedes that we need only review for fundamental error because he did not raise these issues at trial. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. We find that Defendant's claims have no merit as Defendant has not shown that the trial court committed any error. *See Lavers*, 168 Ariz. at 385, 814 P.2d at 342.

¶31 Defendant maintains that the trial court erred in admitting the Pen Pack at the beginning of the trial, suggesting that knowledge of his prior convictions unduly tainted the remainder of the proceedings. To convict Defendant for misconduct involving a weapon as a prohibited possessor, the State is required to prove beyond a reasonable doubt that

Defendant knowingly possessed a weapon and was a "prohibited possessor" at the time he possessed it. *See* A.R.S. § 13-3102(A)(4) (2010); *State v. Cox*, 217 Ariz. 353, 357, ¶¶ 23-24, 174 P.3d 265, 269 (2007). A "[p]rohibited possessor" is defined as any person who has been previously convicted of a felony and "whose civil right to possess or carry a gun or firearm has not been restored." A.R.S. § 13-3101(A)(7)(b) (2010).[10] Evidence of the prior convictions was clearly relevant for establishing Defendant's status as a prohibited possessor at the time the search warrant was served. Ariz. R. Evid. 401. The record shows that the charges in the Pen Pack were redacted and the Pen Pack was "sanitized" in order to minimize any possible prejudicial effect.[11] Defendant could have stipulated to his status if he wished to further minimize the possibility of prejudice, but chose not to do so. The trial court properly admitted the Pen Pack in this case and took appropriate steps to minimize any prejudice. Defendant has not shown that the trial court committed any error, let alone fundamental error, by

[10] At the time the instant crimes were committed, a virtually identical definition of "prohibited possessor" was set forth in A.R.S. § 13-3101(A)(6)(b) (West 2008).

[11] At trial, Defendant objected to admission of the Pen Pack based on "foundation." An objection to the admission of evidence on one ground does not preserve other issues relating to admission on other grounds. *State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993).

admitting the Pen Pack into evidence. *See Id.; Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶32 Defendant also argues that the trial court should have *sua sponte* severed the prohibited possessor charge from the other charges for trial or held a separate trial on his prohibited possessor status. Ariz. R. Crim. P. 13.4. The rule, however, does not require the trial court to sever offenses; it simply allows the trial court to do so if, in the trial court's estimation, severance "is necessary to promote a fair determination of guilt." Ariz. R. Crim. P. 13.4(a). Nothing in the record here suggests that Defendant did not receive a fair trial due to the trial court's not exercising its discretion to sever the prohibited possessor charge from the remainder of the offenses. Again, Defendant fails to prove that the trial court committed any error, let alone fundamental error. *See Lavers*, 168 Ariz. at 385, 814 P.2d at 342.

¶33 Defendant also maintains that it was error for the trial court not to have designated Juror #4 as an alternate or not to have granted his request for a mistrial. On appeal, Defendant suggests that while denying the mistrial may have been justified for reasons of judicial economy, the court abused its discretion when it denied his request to designate the juror an alternate. A trial court's decision to strike a juror is subject to an abuse of discretion review, *State v. Moore,* 222

Ariz. 1, 10, ¶ 37, 213 P.3d 150, 159 (2009) (citation omitted), as is its decision to deny a motion for mistrial. *State v. Hoskins*, 199 Ariz. 127, 142, ¶ 57, 14 P.3d 997, 1012 (2000) (citations omitted).

¶34 At trial, the court explained to the attorneys that Juror #4 had pulled the bailiff aside and expressed a concern stating, "[p]erhaps there should be a mistrial because I have heard evidence of prior crimes." It appears from the record that Juror #4 had been a juror "five times" before. As a result of his prior jury experience, he "thought it was inappropriate to share elements of a prior conviction in a case during a case."

¶35 The trial court and counsel met with Juror #4 during which the court and counsel questioned the juror about his comment. The trial court explained that the situation in this case was different because the State was required to prove certain things. At the end of the discussion, Juror #4 assured the parties that he could set aside his concern, his previous experiences as a juror, and listen to the case and "decide it fairly and impartially."

¶36 The trial court denied Defendant's request that Juror #4 be designated an alternate or that the court declare a mistrial. The trial court stated that it found Juror #4's statements that he could set aside his experiences and be fair

and impartial in this case persuasive. Under the circumstances, we do not find the trial court's actions to have been an abuse of its discretion in this case. *See State v. Chapple*, 135 Ariz. 281, 297, n.18, 660 P.2d 1208, 1224, n.18 (1983) (stating that abuse of discretion occurs when "reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice").

(4) *Equitable Estoppel*

¶37 Defendant maintains that "equitable estoppel and "judicial estoppel" mandate that we vacate his sentences because, at the State's request, the trial court imposed consecutive sentences on Counts 1 and 2 despite the fact that the State initially informed Defendant that only concurrent sentences would be imposed. We need not address Defendant's estoppel issues as the State concedes that it was error for the trial court to impose the consecutive sentences on Counts 1 and 2 in this case. *See Kelly*, 190 Ariz. at 534, ¶ 5, 950 P.2d at 1155 (stating that the imposition of an illegal sentence constitutes fundamental error).

¶38 Our sentencing statutes require the imposition of concurrent sentences for multiple offenses that are the result of the same act. A.R.S. § 13-116 (2010). The analysis set forth by our supreme court in *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989), provides the rationale for

determining whether the same act resulted in charges for multiple offenses and, accordingly, whether consecutive sentences are available for the offenses. We must consider the facts of each crime separately, "subtracting from the factual transaction the evidence necessary to convict on the ultimate charge – the one that is at the essence of the factual nexus and that will often be the most serious of the charges." *Id*. If, after doing so, "the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under A.R.S. § 13-116." *Id*.

¶39 Further, in applying this analytical framework, we must then consider whether "given the entire 'transaction,' it was factually impossible to commit the ultimate crime without also committing the secondary crime." *Id*. If it was in fact factually impossible to commit the "ultimate crime" without also committing the "secondary crime," then the likelihood increases that a defendant committed a single act. *Id*.

¶40 The State views Count 2, possession of a weapon during commission of a felony involving drugs, to be the "ultimate charge" in this case "because it includes the facts at the core of the transaction: marijuana and weapons." We agree. Thus, if we subtract the marijuana and the weapons from Count 2, the remaining evidence is not sufficient to prove Count 1, possession of marijuana for sale. It is, therefore, not

possible for Defendant to commit the "secondary crime," possession of marijuana for sale, without also committing the "ultimate crime," possession of a weapon during the drug offense. *See Id*. The trial court committed fundamental error in imposing consecutive sentences on these counts.

¶41 The State notes that the trial court could have achieved the same sentencing results in this case by imposing consecutive sentences on Count 1 and Count 3 misconduct involving weapons as a prohibited possessor. That is because, under *Gordon*, the possession of marijuana for sale offense and the prohibited possessor offense do not have any factual elements in common. Without the evidence of the marijuana for Count 1, sufficient evidence of the weapons and Defendant's prohibited possessor status remains to convict Defendant on Count 3. Thus, the State urges us to vacate Defendant's sentence and remand this case to the trial court for resentencing on all counts.

¶42 Based on the record before us, we cannot tell what sentences the trial court would have imposed in this case had it not erroneously concluded that consecutive sentences were legally permissible on Counts 1 and 2. Accordingly, we vacate all the sentences and remand to the trial court for resentencing on all counts in accordance with this decision. *See State v. Ojeda*, 159 Ariz. 560, 561, 769 P.2d 1006, 1007 (1989) (finding

that when a trial judge relies on "inappropriate factors" during sentencing, and the record is unclear as to what sentence the judge would have otherwise imposed, "the case must be remanded for resentencing").[12]

CONCLUSION

¶43 For the foregoing reasons, we affirm Defendant's convictions and remand for resentencing in compliance with this decision.

/S/
LAWRENCE F. WINTHROP, Judge

CONCURRING:

/S/
PHILIP HALL, Presiding Judge

/S/
JON W. THOMPSON, Judge

[12] In so doing, we are mindful that the State has also conceded that consecutive sentences are not available under the *Gordon* analysis for Counts 2 and 3. *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. We do not, however, remand for a *Donald* hearing, as Defendant requests. *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000). It is amply clear from the record before us that such a hearing is not called for because we are firmly convinced that Defendant here was not interested in accepting the State's plea offer under any circumstance prior to trial.