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

STATE OF ARIZONA, Appellee, v. TREVONE DEBRAE TAYLOR, Appellant.	)	1 CA-CR 10-0015 DEPARTMENT B MEMORANDUM DECISION (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of Maricopa County

Cause No. CR 2008-152607-001 DT

The Honorable Michael W. Kemp, Judge

AFFIRMED IN PART; REVERSED IN PART; REMANDED

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W E I S B E R G, Judge

¶1 Trevone Debrae Taylor ("Defendant") appeals from his convictions following a jury trial and from the sentences imposed. His counsel filed a brief in accordance with *Anders v. California*,

386 U.S. 738, 744 (1967), and *State v. Leon,* 104 Ariz. 297, 299, 451 P.2d 878, 880 (1969), advising this court that after a search of the entire record on appeal, he found no arguable ground for reversal. Counsel has requested that we search the record for fundamental error. *Anders*, 386 U.S. at 744; *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999).

¶2 This court granted Defendant an opportunity to file a supplemental brief, and he has done so. We also ordered additional briefing pursuant to *Penson v. Ohio,* 488 U.S. 75 (1988), and for reasons that follow, we affirm in part, reverse in part, and remand the matter to the trial court for resentencing.

FACTS AND PROCEDURAL BACKGROUND

¶3 We view the facts in the light most favorable to sustaining the verdict. *State v. Stroud,* 209 Ariz. 410, 412, ¶ 6, 103 P.3d 912, 914 (2005). Defendant was indicted for aggravated assault, a class 2 dangerous felony (Count 1); two counts of burglary in the first degree, class 2 dangerous felonies (Counts 2 and 3); threatening or intimidating, a class 6 dangerous felony (Count 4); and misconduct involving weapons, a class 4 felony (Count 5). The State filed allegations that the offenses were committed with the intent to promote, further or assist criminal conduct by a criminal street gang, the dangerous nature of the felonies as to all counts, and aggravating circumstances other than

prior convictions.[1] The court granted Defendant's motion to sever Count 4 and to preclude gang testimony as to Counts 1, 2, 3 and 5 only. On the State's motion, the court dismissed Count 5 without prejudice. Defendant pled guilty to an amended Count 4 of threatening and intimidating, a class 6 non-dangerous felony. The matter proceeded to trial on Counts 1, 2 and 3.

¶4 The evidence at trial showed that on August 21, 2008, G.Q. left for work in the morning and when he returned home, found that his house in El Mirage had been burglarized and ransacked. He did not know who had committed the burglary (Count 3).

¶5 On the same morning, G.S. who lived near G.Q. heard his doorbell ring several times. He looked outside and saw a man wearing a white shirt and black pants and "had something wrapped up like a black shirt or sweater or something wrapped in his hand." G.S. heard the man break into his house and called 911. After police arrived, G.S. went outside and saw the same man surrounded by police. An officer later conducted a one-man show-up, and G.S. identified the suspect as the man who broke into his house. He also identified Defendant in court as the burglar (Count 2).

¶6 Officer Williams of the El Mirage Police Department received a call of a "burglary in progress." When he arrived on

[1]This was aggravated assault because of the use of a deadly weapon. A.R.S. § 13-1204(A)(2)(2010). A sentence may be enhanced by use of a deadly weapon, even if it is an element of the offense. *State v. Alvarez,* 205 Ariz. 110, 113, ¶¶ 7-8, 67 P.3d 706, 709 (App. 2003).

the scene, he saw Defendant running away with a gun in his hand. Sergeant Whalen arrived and saw Defendant running toward his police car with a handgun. He told Defendant to get down on the ground and to drop the gun, but Defendant kept running. When he was about thirty feet away, Defendant pointed his gun at the officer as he was running past him. The sergeant testified that he feared for his life (Count 1).

¶7 Detective Borrello eventually apprehended Defendant. He searched Defendant, but did not find a weapon on him. Detective Peoples interviewed Defendant at the scene after he gave him *Miranda*[2] warnings. Defendant admitted he had possessed a gun and told the detective where it could be located. Police found Defendant's silver .45 Ruger in a nearby front yard. Officer Buck later searched Defendant's room in his father's house and found a .45 caliber round on Defendant's desk.

¶8 Detective Peoples interviewed Defendant at the police station. Defendant told the detective that he had a gun when he was running away from the police officers. He admitted that he committed the two burglaries, one right after the other, but did not admit he had the gun while committing the crimes. He also admitted that he broke into the homes to take video games, jewelry, cash and credit cards. He denied pointing his gun at Sergeant Whalen and said he thought the officer was mistaken about this.

[2]*Miranda v. Arizona,* 384 U.S. 436 (1966).

¶9 The jury found Defendant guilty of the charges. As to the aggravated assault, the jury found the offense was dangerous and found as aggravators, that the victim was a peace officer engaged in the execution of his official duties and that the offense involved the threatened infliction of serious physical injury. As Count 2, the jury found the offense was dangerous and found as an aggravator, financial harm to the victim. As to Count 3, the jury found the offense was not dangerous, but found as an aggravator, financial harm to the victim.

¶10 At sentencing, on Count 1, the court found that the aggravating factors found by the jury outweighed the mitigating factors and imposed an aggravated sentence of twelve years with 484 days of presentence incarceration credit.[3] On Count two, the court imposed a minimum sentence of seven years, that sentence to run consecutively to the sentence in Count 1. On Count 3, the court imposed the minimum sentence of four years with 484 days of presentence incarceration credit, that sentence to run concurrently to the sentence in Count 2.[4] Defendant timely appealed. We have

[3]The court had to impose at least a presumptive sentence on this count and it had to be a flat-time sentence under former A.R.S. § 13-604(U)(2008).

[4]The sentencing minute entry incorrectly states that the sentences on Counts 2 and 3 are presumptive when the transcript of the oral pronouncement indicates that the terms were both mitigated. Upon remand for resentencing, the superior court is directed to correct the minute entry to accord with the oral pronouncement. In addition, the minute entry indicates that the court improperly awarded 484 days of presentence incarceration

jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003) and 13-4031, -4033 (A) (2010).

DISCUSSION

Defendant's Supplemental Opening Brief

¶11 Defendant has filed a supplemental opening brief *in propria persona* in which he argues that the county attorney violated his due process rights by failing to file a complaint or obtaining an indictment within forty-eight hours from the time of his initial appearance and refusing to release him as required by Arizona Rule of Criminal Procedure 4.1(b). He also claims the county attorney violated the doctrine of separation of powers under Article III of the Arizona Constitution because he filed the direct complaint seven days after the initial appearance.

¶12 The record shows Defendant was arrested on Thursday, August 21, 2008 and his initial appearance was on Friday, August 22, 2008. Contrary to Defendant's assertion that the direct complaint was filed on August 28, 2008, the record reflects that it was filed on Tuesday, August 26, 2008.

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credit against the term of imprisonment imposed for Count 3. *See* A.R.S. § 13-712(B) (2010); *State v. Jackson*, 170 Ariz. 89, 94, 821 P.2d 1274, 1279 (App. 1991); *State v. Cuen*, 158 Ariz. 86, 88, 761 P.2d 160, 162 (App. 1988). Nevertheless, the State did not cross-appeal from the sentence, and therefore, neither we nor the superior court may correct an illegally lenient sentence. *State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741-744-45 (1990).

¶13 Rule 4.1(b) states: "A person arrested without a warrant shall be taken before the . . . magistrate in the county of arrest, whereupon a complaint . . . shall promptly be prepared and filed." It further provides that "[i]f a complaint is not filed within 48 hours from the time of the initial appearance before the magistrate, the defendant shall be released from jail." The time requirements of Rule 4.1(b) exclude Saturday, Sunday and legal holidays. Ariz. R. Crim. P. 1.3. Because August 23 and 24 were weekend days, the direct complaint had to be filed on August 26, 2008. The direct complaint was timely filed.

Appellate Counsel's Supplemental Opening Brief

¶14 Pursuant to *Penson v. Ohio,* 488 U.S. 75 (1988), we ordered appellate counsel to file a supplemental brief addressing two issues: (1) whether "knowing possession" of a deadly weapon as an element of the offense of burglary in the first-degree under A.R.S. § 1508(A)(2010) is the same as "use" of a deadly weapon for purposes of sentence enhancement under former A.R.S. § 13-604(P) (2007) as the State argued at trial; and (2) whether there was sufficient evidence to support the jury's finding that the first-degree burglary in Count 2 was a dangerous offense. We ordered the State to respond.

¶15 In his supplemental opening brief, appellate counsel relies on the statutory definitions of "possess" and "possession" under A.R.S. § 13-105(33),(34) (2010) and the ordinary meaning of

the word "use", i.e., to "put into service or action." *Websters II New College Dictionary,* 1215 (1999). He argues that mere possession of a deadly weapon "does not make the crime [in Count 2] dangerous as the State argued in this case."

¶16 In a thorough and well-reasoned answering brief, the State concedes there was reversible error in this case as to Count 2. Relying on related case law and rules of statutory construction of the applicable statutes, it argues that mere "possession" of a deadly weapon as an element of the offense of first-degree burglary does not constitute "use" of a deadly weapon for purposes of sentence enhancement under former A.R.S. § 13-604(P). *See, e.g., Bailey v. United States,* 516 U.S. 137, 143 (1995) (interpreting federal statute that increased punishment for using or carrying a firearm while committing certain offenses and holding that "use" "connote[s] more than mere possession of a firearm" and requires "*active employment*" of the firearm);[5] *State v. Aguilar,* 218 Ariz. 25, 38, ¶ 48, 178 P.3d 497, 510 (App. 2008) (if legislature intended that language found in one statute also applied to another related statute, it would have expressly said so); *Rigel Corp. v. State,* 225 Ariz. 65, 69, ¶ 19, 234 P.3d 633, 637 (App. 2010) (when legislature has not defined a word in a statute, we may consider

[5]After *Bailey*, Congress expanded 18 U.S.C. § 924(c)(1) to cover a defendant who "possess[ed] a firearm "but did not amend the provision regarding "use" of a weapon while committing an offense." *Watson v. U.S.,* 652 U.S. 74, 76 (2007).

its common usage and dictionary definition). Accordingly, the State has requested that the finding of dangerousness on Count 2 be vacated and the matter remanded for resentencing.

¶17 Here, the jury was instructed on the statutory definitions of actual and constructive possession. Although the jury was instructed on the definition of a dangerous offense, it was not instructed on the meaning of "use" of a deadly weapon. Defendant argued to the jury in closing that possession and use are not the same and that a finding of dangerousness required a finding that Defendant had discharged, used or threatened exhibition of a dangerous instrument. Over Defendant's objection, the court permitted the prosecutor to argue to the jury that "the mere fact that [Defendant] had [the gun] on his person is using it." She further argued that "these are dangerous offenses because Defendant was using the gun that day . . . [and] [w]hat the law says is use, and using--mere possession of the gun is using it. . . . By the mere fact that [Defendant] had it, he was using it."

¶18 The prosecutor's arguments were an incorrect statement of the law. And as the State points out, the error was not harmless as to Count 2 because it appears the jury erroneously found that the burglary of G.S.'s home "was dangerous because he 'used' a gun by merely possessing it." *Cf. State v. Moody,* 208 Ariz. 424, 460, ¶¶ 150-151, 94 P.3d 1119, 1155 (2004) (prosecutor's improper comment that if jury found defendant guilty but insane he would be

"cut loose" was an incorrect statement of law, but not reversible error because court ordered jury to disregard the statement and prosecutor attempted to remedy the error). We agree with the parties' analysis and conclusion on this issue. The finding of dangerousness and the sentence on Count 2 must be vacated and the matter remanded for resentencing on that Count.[6]

CONCLUSION

¶19 For the foregoing reasons, we affirm Defendant's convictions and the sentences on Counts 1 and 3. We vacate the finding of dangerousness and the sentence on Count 2 and remand for resentencing in accordance with this court's decision.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

*/s/*_____
DONN KESSLER, Presiding Judge

/s/_____
DIANE M. JOHNSEN, Judge

[6]Because of our resolution of this issue, we need not address the second issue of whether there was sufficient evidence to support the finding of dangerousness on Count 2. The State contends that Defendant's appellate counsel also argued that there was insufficient evidence to support the first-degree burglary convictions. To the extent that appellate counsel has done so, we reject that argument as there was sufficient evidence that Defendant possessed a deadly weapon when he committed the burglaries.