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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



DIVISION ONE  
FILED: 07/21/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

STATE OF ARIZONA, ) 1 CA-CR 10-0747  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) MEMORANDUM DECISION  
)  
DEANDRE MARQUIS MCCUIN, )  
) (Not for Publication -  
Appellant. ) Rule 111, Rules of the  
) Arizona Supreme Court)  
)  
)  
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Appeal from the Superior Court in Maricopa County

Cause No. CR2009-179448-001DT

The Honorable Lisa Daniel Flores, Judge

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
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Attorneys for Appellee

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Attorney for Appellant

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B A R K E R, Judge

¶1 Deandre McCuin appeals his sentences for threatening or intimidating, a class 3 felony; and assisting a criminal street gang, a class 3 felony. For the reasons set forth below, we affirm.

***Facts and Procedural Background***<sup>1</sup>

¶2 On December 26, 2009, two police officers stopped a Chevy Suburban because a records check showed it had a mandatory insurance suspension. McCuin was in the passenger seat, and one of the officers saw that he had marijuana. The officers arrested McCuin, transported him to the police station, and placed him in a holding cell. While being held at the station, McCuin made threatening statements to one of the officers, appended with the phrase "tell him West Side City Dre said that." The officer testified that he felt threatened that McCuin would have his gang carry out the threat. McCuin had a gang tattoo, had previously been documented as a gang member, and also admitted that he was a member of a gang.<sup>2</sup>

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<sup>1</sup> We review the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against McCuin. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

<sup>2</sup> According to one detective's testimony, under statutory gang membership identification criteria, gang tattoos and self-proclamation are sufficient to document a person as a gang member.

¶13 The State charged McCuin with three counts: (1) possession of marijuana; (2) threatening or intimidating; and (3) assisting a criminal street gang. The jury found McCuin guilty on each count. As part of the aggravation proceedings, the jury made the specific factual finding that McCuin committed the "threatening or intimidating" count and the "assisting a criminal street gang" count with the "intent to promote, further or assist [] criminal conduct by a criminal street gang." By finding this fact as to the "threatening or intimidating" count, it became a class 3 felony. Ariz. Rev. Stat. ("A.R.S.") § 13-1202 (2010). Otherwise, the conviction would have been a class 1 misdemeanor or a class 6 felony. *Id.*

¶14 The trial court found that McCuin had one historical prior felony conviction that could be used for sentencing enhancement. During sentencing, the judge further enhanced McCuin's sentences for "threatening or intimidating" and "assisting a criminal street gang." The judge reasoned that "because the jury found that the offenses in [the counts] were committed with the intent to promote, further, or assist a criminal street gang . . . [A.R.S. § 13-709.02(C)] adds five years to [the sentence of] each [count]." The judge sentenced McCuin to a total of 11.5 years on each count because "the presumptive would be 6.5 years, but when adding five years

necessary pursuant to A.R.S. § [13]-709.02(C), it jumps up to 11.5 years.”

¶15 McCuin timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031, and 13-4033(A)(1) (2010).

### ***Discussion***

¶16 McCuin argues that the trial court was precluded under Arizona’s double punishment statute from using the finding that he was promoting, furthering, or assisting criminal conduct by a criminal street gang to enhance his sentences on his convictions. According to McCuin, because promoting, furthering, or assisting in criminal conduct by a criminal street gang was an element of his convictions for both “threatening or intimidating” under A.R.S. § 13-1202(A)(3) and “assisting a criminal street gang” under A.R.S. § 13-2321 (2010), Arizona’s bar against consecutive sentences for double punishment precluded using this same element to enhance his sentence under A.R.S. § 13-709.02(C) (2010).<sup>3</sup>

¶17 Arizona permits double punishment of the same crime in different ways by different sections of the law. The sentences

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<sup>3</sup> McCuin does not assert, and accordingly we do not address, whether proving the elements under A.R.S. §§ 13-1202 (A)(3) and/or -2321(B) means that the factual finding required under A.R.S. § 13-709.02(C) has been met. We assume they are the same elements only because that is the premise of McCuin’s argument.

for the punishments, however, must be served concurrently. A.R.S. § 13-116 (2010) ("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.").

¶8 McCuin's convictions for the class 3 felony of threatening or intimidating and the class 3 felony of assisting a criminal street gang both required proof that McCuin committed the crimes in order or with the intent to promote, further, or assist a criminal street gang. A.R.S. §§ 13-1202, -2321. Indeed, the presence of this element elevated his punishment for threatening or intimidating from a class 6 felony to a class 3 felony. A.R.S. § 13-1202(C). The judge then added an additional five years to McCuin's sentences on both counts pursuant to A.R.S. § 13-709.02(C), which provides sentencing enhancements for "[a] person who is convicted of committing any felony offense with the intent to promote, further or assist any criminal conduct by a criminal street gang." The statute states:

The presumptive, minimum and maximum sentence for the offense shall be increased by . . . five years if the offense is a class 2 or 3 felony. The additional sentence imposed pursuant to this subsection is in addition to any enhanced sentence that may be applicable.

A.R.S. § 13-709.02(C). According to McCuin, this five-year sentencing enhancement is impermissible under Arizona's double punishment statute because it effectively punishes him twice under different statutes without the sentences running concurrently. See A.R.S. § 13-116 (permitting punishment of same conduct under different statutory sections only if sentences run concurrently).

¶19 Our case law, however, suggests otherwise. In *State v. Green*, our supreme court permitted use of a dangerous finding based on the same event or occurrence to more than one offense, reasoning in part that "§ 13-116 was not designed to cover sentence enhancement." 182 Ariz. 576, 580, 898 P.2d 954, 958 (1995).<sup>4</sup> This interpretation is consistent with a plain-language analysis of the statutes at issue, which is "the best and most reliable index of a statute's meaning." *State v. Christian*, 205

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<sup>4</sup> *Green* relied on *State v. Rodriguez* for this proposition. *Green*, 182 Ariz. at 580, 898 P.2d at 958. In *Rodriguez*, we reasoned that the double punishment statute did not apply to sentencing enhancements increasing the punishment for aggravated assault when a gun was used because aggravated assault could be committed without use of a gun. *State v. Rodriguez*, 126 Ariz. 104, 107, 612 P.2d 1067, 1070 (App. 1980). Although this case could be read as limiting non-applicability of the double punishment statute only to sentencing enhancements that contain additional elements than the foundational crime, the later language from our supreme court in *Green* is not limited in this fashion. *Green*, 182 Ariz. at 580, 898 P.2d at 958 (stating that "§ 13-116 was not designed to cover sentence enhancement"). In addition, as we describe below, the clear intent of the legislature as evidenced by the plain language of § 13-709.02(C) was to permit cumulative sentencing.

Ariz. 64, 66, ¶ 6, 66 P.3d 1241, 1243 (2003). The text of our double punishment statute reads: "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*." A.R.S. § 13-116 (emphasis added). Sentencing enhancements never run concurrently, and are always cumulative. In addition, sentencing enhancements are not generally seen as separate "sentences," but rather enlargements (i.e., "enhancements") of the single foundational sentence. It is unlikely that the legislature intended to include the entire class of sentencing enhancements in this language without specifically addressing the issue. The more likely intent was simply to preclude cumulative sentences for the same act when a criminal statute also covers a separate, lesser-included offense.

¶10 In any case, even if our double punishment statute did cover sentencing enhancements, § 13-709.02(C) plainly states the legislature's intent that the special sentencing enhancements it imposes are to be cumulative. "[W]here a special statute deals with the same subject as a general statute, the special statute will control." *State v. Weiner*, 126 Ariz. 454, 456, 616 P.2d 914, 916 (App. 1980). Here, the specific provision enhancing the sentence for assisting a criminal street gang in § 13-709.02(C) increases the presumptive, minimum, and maximum

sentence of any crime by five years if the crime is a class 2 or 3 felony. A.R.S. § 13-709.02(C). The statute then plainly states: "The additional sentence imposed pursuant to this subsection is in addition to any enhanced sentence that may be applicable." *Id.* The legislature evidently was aware that an enhanced sentence would apply when a defendant was assisting a criminal street gang and chose to enhance those sentences further by imposing punishment "in addition to any enhanced sentence that may be applicable." *Id.* This specific provision overrides the more general double-punishment provision. See *Weiner*, 126 Ariz. at 456, 616 P.2d at 916.

¶11 Therefore, although McCuin received an enhanced punishment on the two counts at issue, there was no error. The trial judge properly enhanced McCuin's sentences under § 13-709.02(C).

**Conclusion**

¶12 For the foregoing reasons, we affirm McCuin's convictions and sentences.

/s/

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DANIEL A. BARKER, Presiding Judge

CONCURRING:

/s/

/s/

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MAURICE PORTLEY, Judge

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DIANE M. JOHNSEN, Judge