DIVISION ONE
FILED: 08/04/2011
RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0775
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ALBERTO GERARDO DELGADO,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-005419-002DT

The Honorable Kristin C. Hoffman, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Defendant, Alberto Gerardo Delgado, appeals from his convictions and sentences for attempted second degree murder, aggravated assault, drive-by-shooting, assisting a criminal

street gang, minor in possession of a firearm, and theft of a means of transportation. Defendant argues (1) that the prosecutor committed reversible error when she conveyed to the jury that information and witnesses not presented at trial supported guilty verdicts and (2) that the trial court erred when it enhanced Defendant's sentence for his conviction for assisting a criminal street gang pursuant to Arizona Revised Statutes (A.R.S.) section 13-709.02.C (2010).[1] For the reasons set forth below, we affirm.

FACTS[2] AND PROCEDURAL HISTORY

¶2 On August 20, 2009, Defendant and co-defendants David Assi, Orlando Sagaste-Lopez, and Jesse Favela were driving in Assi's Nissan in an area known as "The Square." They saw Juan H. (Victim) driving in the opposite direction.

¶3 At the time of this incident, Defendant, Assi, and Favela were members of a gang known as Playboy Surenos or "PBS." Victim was a member of a gang called Mexican Brown Pride or "MBP." The two gangs were known rivals and part of their

[1] We cite to the current version of applicable statutes where no revisions material to this decision have since occurred.

[2] 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).

rivalry involved felony activity in the area known as The Square.

¶4 As they saw Victim drive past, Assi turned his vehicle around and followed Victim to his girlfriend's home. Assi pulled his Nissan alongside Victim's SUV, and Defendant fired a shotgun "multiple" times at Victim's face. Assi also shot at Victim with a .45 caliber handgun. Victim was struck multiple times in the face and head before the Nissan drove away. Victim survived the shooting but was rendered blind in his left eye and a number of gunshot pellets that could never be retrieved were embedded in his brain, spine and the soft tissue of his face, neck and chest. When Defendant was arrested and questioned by police why he shot Victim, Defendant replied "Playboy controlla," which was "Spanish slang for control . . .Playboy control, to control the area."

¶5 Defendant and Assi as co-defendants and accomplices where charged with attempted second degree murder, a class two dangerous felony (count one); two counts of aggravated assault, each class three dangerous felonies (count two/shotgun and count three/handgun); drive by shooting, a class two dangerous felony (count four); and assisting a criminal street gang, a class three felony (count five). The State also charged Defendant individually with being a minor in possession of a firearm, a

class six felony (count seven) and theft of a means of transportation,[3] a class three felony (count eight).

¶6 A jury found Defendant guilty of all charges. On each of the offenses save the theft offense, the jury additionally found that Defendant committed the offense "with the intent to promote, further, or assist gang criminal conduct by a criminal street gang."

¶7 The trial court sentenced Defendant to: a slightly aggravated term of twenty years in prison on count one; presumptive terms of twelve and one half years in prison on counts two and three; a presumptive term of fifteen and one half years in prison on count four; a presumptive term of six and one half years in prison on count five; a presumptive one-year prison term on count seven; and a presumptive term of three and one half years in prison on count eight. The court ordered that all of the sentences be served concurrently.

¶8 Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21.A.1 (2003), 13-4031 and -4033 (2010).

DISCUSSION

[3] At trial, Defendant's mother testified that at the time of this incident Defendant had been in possession of her van for several weeks without her permission and she had reported the matter to the police.

¶9 Defendant argues on appeal that the prosecutor engaged in "improper vouching," and the trial court erred in enhancing his sentence. Defendant did not raise any objections to the testimony during trial; nor did he object during sentencing. Defendant has therefore forfeited his right to obtain appellate relief on these arguments unless he establishes that fundamental error occurred. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* (quotation marks and citation omitted). To prevail on this standard, a defendant must show "both that fundamental error exists and that the error in his case caused him prejudice." *Id*. at ¶ 20. However, before this court conducts a fundamental error review, it must first determine that some error occurred. *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991).

Prosecutorial Misconduct/Vouching

¶10 During the State's case in chief, two Phoenix gang unit police detectives testified, among other things, that gang members adhere to a "gang code" of silence that induces them to refrain from testifying against the gang; that gang members will intimidate others, even non-members, to keep them from

testifying; that talking to police or "snitching" on a gang member, even one in a rival gang, is one of the worst things that a gang member can do; and that gang members have been killed because they spoke with police or "snitched." Defendant argues on appeal that this line of questioning by the prosecutor constituted "improper vouching" because it was intended to convey to the jury "that it was likely there were other witnesses to support the prosecution case, but these other witnesses would not testify." He contends that this line of questioning was highly prejudicial and requires reversal. We find no error in the admission of the officers' testimony and reject Defendant's argument that it constituted improper vouching.

¶11 A prosecutor's comments amount to impermissible vouching when they either (1) place the prestige of the government behind a state witness or (2) suggest "that information not presented to the jury supports the [witness's testimony]." *State v. Newell*, 212 Ariz. 389, 402, ¶ 62, 132 P.3d 833, 846 (2006). The latter type of "vouching" involves comments that "bolster a witness' credibility by reference to material outside the record." *State v. Dunlap*, 187 Ariz. 441, 462, 930 P.2d 518, 539 (App. 1996). Defendant maintains that the officers' testimony here falls into that latter category because the only "logical reason" for introducing it was to

suggest that there were "other witnesses" that would support the State's case but that they would not testify because of gang intimidation. The record does not support Defendant's contention.

¶12 The record shows that the State had problems securing Segaste-Lopez's and Favela's testimony in this case. In fact, both were given use immunity by the State in order to secure their testimony at trial.[4] Contrary to Defendant's argument, the record shows that the officers' testimony was used to explain the reluctance of Segaste-Lopez and Favela to appear at trial as well as to account for any inconsistencies between their trial testimony and prior statements they made to police. For example, at trial neither witness directly admitted to being "afraid" to testify. However, Segaste-Lopez appeared at trial in handcuffs and admitted he was in handcuffs because he had failed to appear to testify when he was previously required to do so.[5] Favela denied he previously told one of the detectives that he was afraid to testify at trial and also testified that statements he previously made to that detective were attributable to the fact that the detective threatened him.

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[4] The jury was informed of this fact at trial.

[5] The day prior to his appearance was the day that one of the detectives testified about the codes of silence that existed among gang members. He also testified Segaste-Lopez had failed to appear and that there was a warrant out at the time for his arrest.

However, the detective testified on cross-examination that, during an interview with Favela, that Favela discussed with him his concerns about speaking to police and that Favela did not want to speak with the detective or to testify at trial. On redirect, the detective attributed Favela's reluctance to the fact that Favela would be seen as breaking gang "code."

¶13 There is no indication in the record that the prosecutor engaged in misconduct or used the detectives' testimony in an improper manner, as Defendant argues. Defendant fails to establish that any error, let alone fundamental error, occurred in his case. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

Sentence Enhancement

¶14 The jury found Defendant guilty of the crime of assisting a criminal street gang, a class three dangerous felony. A.R.S. § 13-2321.D (2010). That offense required the State to prove that Defendant had "committed Attempted Second Degree Murder and/or Aggravated Assault and/or Drive by Shooting . . . for the benefit of, at the direction of or in association with Playboy Surenos, a criminal street gang, intending to promote, further or assist the gang's criminal conduct." The jury also separately found that the crime was committed "with the intent to promote, further, or assist gang criminal conduct by a criminal street gang."

¶15 The trial court sentenced Defendant to the presumptive term of three and one half years in prison and further enhanced the sentence with an additional three years pursuant to A.R.S. § 13-709.02.C. Defendant claims the three-year enhancement is reversible error under A.R.S. § 13-116 (2010) which provides that "[a]n act or omission which is made punishable . . . by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." Defendant argues that because the act of promoting, furthering or assisting a criminal street gang was punished under A.R.S. § 13-2321 it cannot also be punished under A.R.S. § 13-709.02.C without violating the prohibition against double punishment of A.R.S. § 13-116. Thus, Defendant contends his sentence for this offense should be reduced by three years.

¶16 We review a trial court's imposition of a sentence for an abuse of discretion. *State v. Cazares*, 205 Ariz. 425, 427, ¶ 6, 72 P.3d 355, 357 (App. 2003). When, as here, a defendant fails to object to a sentencing error before the trial court, we need only review for fundamental error. *Henderson*, 210 Ariz. at 568, ¶ 22, 115 P.3d at 608. However, an illegal sentence constitutes fundamental error. *State v. Joyner*, 215 Ariz. 134, 137, ¶ 5, 158 P.3d 263, 266 (App. 2007).

¶17 First, as the State correctly notes, A.R.S. § 13-116 is not applicable to the enhancement provisions. *See, e.g.,*

State v. Greene, 182 Ariz. 576, 580, 898 P.2d 954, 958 (1995) (finding prohibition against double punishment in § 13-116 not designed to cover sentence enhancement); *State v. Rodriguez*, 126 Ariz. 104, 107, 612 P.2d 1067, 1070 (App. 1980) (in context of dangerousness enhancement, finding § 13-116 not designed to cover enhancement but only to protect defendant from double punishment when he has been found guilty of two or more crimes arising from the same fact situation). For example, an enhancement based on a "dangerousness" finding does not violate the § 13-116 prohibition against double punishment simply because the use of a gun was also an element of the underlying crime where the sentencing provisions clearly show a legislative intent to authorize the imposition of an increased punishment for the use of the gun. *Rodriguez*, 126 Ariz. at 107, 612 P.2d at 1070; *see also State v. Tresize*, 127 Ariz. 571, 574, 623 P.2d 1, 4 (1980) (not double jeopardy to use a deadly weapon both to classify the crime as more serious felony and to enhance sentence); *State v. Garcia*, 176 Ariz. 231, 234, 860 P.2d 498, 501 (App. 1993) (citing *State v. Lara*, 171 Ariz. 282, 830 P.2d 803 (1992)) (use of element of underlying offense to also enhance punishment does not run afoul of guarantees against double jeopardy or double punishment when specifically provided by legislature).

¶18 Here, our legislature specifically provided that an enhanced sentence is to be imposed for "*any* felony offense" committed "with the intent to promote, further or assist *any* criminal conduct by a criminal street gang." A.R.S. § 13-709.02.C (emphasis added). Accordingly, we conclude that the trial court committed no error,[6] let alone fundamental error, by enhancing Defendant's sentence on this count. *See Lavers*, 168 Ariz. at 385, 814 P.2d at 342.

CONCLUSION

¶19 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/S/
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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
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PATRICIA K. NORRIS, Judge

/S/
_____
PHILIP HALL, Judge

[6] As the State notes, because assisting a criminal street gang is a class three felony offense, the proper enhancement under the statute would have been five rather than three years. A.R.S. § 13-709.02.C. However, this court will not correct a sentencing error that benefits a defendant in the context of his own appeal, absent a proper appeal or cross-appeal by the state. *State v. Kinslow*, 165 Ariz. 503, 507, 799 P.2d 844, 848 (1990) (citing *State v. Dawson*, 164 Ariz. 278, 286, 792 P.2d 741, 749 (1990)).