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

DIVISION ONE
FILED: 11/29/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	1 CA-CR 10-0903
Appellee,	DEPARTMENT A
v.	**MEMORANDUM DECISION**
PHILLIP MATTHEW EWING,	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
Appellant.	

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR200901150

The Honorable William T. Kiger, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
and Sarah E. Heckathorne, Assistant Attorney General
Criminal Appeals/Capital Litigation Division
Attorneys for Appellee

David Goldberg, Esq. — Fort Collins, CO
Attorney for Appellant

B A R K E R, Judge

¶1 Phillip Matthew Ewing appeals his convictions and sentences for attempted first degree murder, aggravated assault, and misconduct involving weapons. Ewing argues there is insufficient evidence to support his convictions for both attempted first degree murder and misconduct involving weapons; his convictions for attempted murder and misconduct involving weapons are multiplicitous; the trial court did not properly instruct the jury regarding attempted murder or misconduct involving weapons; and the trial court committed various sentencing errors. For the reasons that follow, we affirm Ewing's convictions and sentences.

Background

¶2 The State charged Ewing with attempted first degree murder, aggravated assault, and misconduct involving weapons after Ewing stabbed the victim in the lower back as she worked in her retail shop in Prescott. At trial, Ewing conceded he stabbed the victim, but argued he did not intend to kill her. We discuss additional details of the offenses in the context of the issues addressed below.

¶3 A jury convicted Ewing as charged. The trial court imposed an aggravated sentence of 23.1 years' imprisonment for attempted first degree murder; a concurrent, aggravated sentence of 16.25 years for aggravated assault; and a consecutive, presumptive sentence of 4.5 years for misconduct involving weapons. Ewing now appeals. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona

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

I. Sufficiency of the Evidence

¶4 Ewing argues the evidence is insufficient to support his convictions for either attempted first degree murder or misconduct involving weapons. Specifically, Ewing argues there was no evidence he intended to kill the victim or that the knife he used was a "deadly weapon" or "prohibited weapon" as defined under Arizona law.

¶5 "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996). "To set aside a jury verdict for insufficient evidence, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). "The question is whether, on the evidence presented, rational factfinders could find guilt beyond a reasonable doubt." *State v. Fulminante*, 193 Ariz. 485, 493, ¶ 24, 975 P.2d 75, 83 (1999).

¶6 "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). In our review of the record, we resolve any conflict in the evidence in favor of sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). We do not weigh the evidence: that is the function of the jury. *See id*.

A. Attempted First Degree Murder

¶7 A person commits attempted first degree murder if, acting with the kind of culpability otherwise required for the commission of first degree murder, the person intentionally does anything which, under the circumstances as that person believes them to be, is any step in a course of conduct planned to culminate in the commission of first degree murder. *See* A.R.S. § 13-1001(A)(2) (2009) ("attempt" defined). As charged and instructed in this case, a person commits first degree murder if, "[i]ntending or knowing that the person's conduct will cause death, the person causes the death of another person . . . with premeditation." A.R.S. § 13-1105(A)(1) (2009).

¶8 Ewing attacked the victim from behind and plunged a 2.5 inch by 7 inch knife blade 5 inches deep into her lower back. Despite this, Ewing contends the evidence is insufficient to support his conviction for attempted first degree murder because there is no evidence of a specific intent to kill the victim.[1] Relying on *State v. Vitale*, Ewing argues the fact he

[1] Ewing does not challenge the sufficiency of the evidence to support any other element of the offense.

plunged a knife 5 inches deep into the victim's lower back is, by itself, insufficient to establish the intent to kill. Ewing argues the State must prove intent with evidence independent of the act of stabbing the victim. *See State v. Vitale*, 23 Ariz. App. 37, 44, 530 P.2d 394, 401 (1975) ("The crime of attempt requires proof of an overt act and specific intent, which must be proven by evidence other than the overt act itself.").

¶9 The evidence is sufficient to support Ewing's conviction for attempted first degree murder. Ewing's reliance upon *Vitale* is unavailing. *Vitale* relied upon *Elfbrandt v. Russell*, 97 Ariz. 140, 146, 397 P.2d 944, 948 (1964) *rev'd on other grounds*, 384 U.S. 11 (1966), which in turn relied upon the California case of *People v. Snyder*, 104 P.2d 639 (Cal. 1940). *Vitale*, 23 Ariz. App. at 44, 530 P.2d at 401. In *State v. Rodriguez*, decided shortly after *Vitale*, our supreme court "refuse[d]" to adopt the holding in *Snyder* "as an abstract proposition of law." *State v. Rodriguez*, 114 Ariz. 331, 333, 560 P.2d 1238, 1240 (1977). Instead, our supreme court reaffirmed: "The law in Arizona is that a specific intent to do an act may be inferred from the circumstances of the doing of the act itself." *Id*. Intent may "be implied from the facts that establish the doing of the act, and a specific intent may at times be presumed from the conduct of the accused in the doing of the act, *as in cases involving an intent to kill*." *Id*.

(quoting *State v. White*, 102 Ariz. 97, 98, 425 P.2d 424, 425 (1967)) (emphasis added).

¶10 We also disapproved of the overbroad language in *Vitale* over thirty years ago. *See State v. Wilson*, 120 Ariz. 72, 74, 584 P.2d 53, 55 (App. 1978) ("*Vitale* should not, . . . in our opinion, be blindly followed as an abstract principle of law."). We further distinguished *Vitale* by noting *Vitale* involved the offense of attempted receipt of stolen property, and our supreme court had held many years prior that merely possessing stolen property was legally insufficient to establish the possessor knew the property was stolen or had the intent to possess stolen property. *Id.* Therefore, evidence separate and apart from receipt was necessary to establish guilt in *Vitale*. *Id*. This is not the case with attempted first degree murder.

¶11 We acknowledge a person, "with only mischief in his mind, may actually take a step in the direction of a criminal offense without attempting to commit that crime if his state of mind does not include an intent to commit it." *Id*. Whether that intent is present is a matter for the jury. The law in Arizona, however, is clear: "[T]here are times when intent may be inferred from conduct where it is plainly indicated as a matter of logical probability." *Id*. The instant matter is a case where the intent to commit first degree murder may be plainly indicated as a matter of logical probability. The use of an instrument capable of producing a result and in a manner calculated to have that result will support an inference of actual intent even in the absence of any other evidence or reasonable explanation. *Id*. More specific to this case, "The use of a deadly weapon . . . gives rise to presumption of the intent to kill." *State v. Dixon*, 107 Ariz. 415, 420, 489 P.2d 225, 230 (1971). A knife qualifies as a deadly weapon. *State v. Clevidence*, 153 Ariz. 295, 301, 736 P.2d 379, 385 (App. 1987). The evidence, therefore, is sufficient to support Ewing's conviction for attempted first degree murder.

B. Misconduct Involving Weapons

¶12 Ewing argues the evidence is also insufficient to support his conviction for misconduct involving weapons. As charged in this case, a person commits misconduct involving weapons if they knowingly possess a "deadly weapon" or "prohibited weapon" and the person is a prohibited possessor. A.R.S. § 13-3102(A)(4) (2009). "'Deadly weapon' means anything that is designed for lethal use. The term includes a firearm." A.R.S. § 13-3101(A)(1) (2009).[2] Ewing argues the evidence is insufficient to support his conviction for misconduct involving

[2] As discussed more fully below, the jury instructions did not include the definition of "prohibited weapon." *See* A.R.S. § 13-3101(A)(8) ("prohibited weapon" defined).

weapons because a knife is neither a "deadly weapon" nor a "prohibited weapon."[3]

¶13 When interpreting a statute, we attempt to fulfill the intent of the drafters, and we look to the plain language of the statute as the best indicator of that intent. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). We give the words and phrases of the statute their commonly accepted meaning unless the drafters provide special definitions or a special meaning is apparent from the text. *State v. Barr*, 183 Ariz. 434, 438, 904 P.2d 1258, 1262 (App. 1995). If the language is clear and unambiguous, we give effect to that language and do not employ other methods of statutory construction. *State v. Riggs*, 189 Ariz. 327, 333, 942 P.2d 1159, 1165 (1997).

¶14 The evidence is sufficient to support Ewing's conviction for misconduct involving weapons. Again, a "deadly weapon" is anything designed for lethal use. A "knife clearly qualifies as a 'deadly weapon' under A.R.S. § 13-3101." *Clevidence*, 153 Ariz. at 301, 736 P.2d at 385. That a knife is not included in the definition of "prohibited weapon" does not exclude a knife from the definition of "deadly weapon." Further, defining "deadly weapon" to include a firearm does not

[3] Ewing does not challenge the sufficiency of the evidence to support any other element of the offense.

exclude everything else "designed for lethal use" that is not a firearm from the definition.

¶15 Despite Ewing's attempts to do so, *Clevidence* is not distinguishable. Again, *Clevidence* held a "knife clearly qualifies as a 'deadly weapon' under A.R.S. § 13-3101." *Id*. *Clevidence* referred to a version of A.R.S. § 13-3101 that defined "deadly weapon" exactly the same way it does now: "[A]nything designed for lethal use. The term includes a firearm." *Id*. at 300, 736 P.2d at 384. That *Clevidence* cited *State v. Williams* in addition to A.R.S. § 13-3101 does not render *Clevidence* distinguishable. *State v. Williams*, 110 Ariz. 104, 515 P.2d 849 (1973). *Williams* did not, as argued by Ewing, rely "on the interpretation of a completely different and unrelated criminal statute." *Williams* flatly held: "A knife is a deadly weapon." *Williams*, 110 Ariz. at 105, 515 P.2d at 850. *Williams* did not interpret or even identify any statute in support of this holding, and Ewing does nothing to explain how this holding is no longer valid.

II. Multiplicity

¶16 Ewing argues the counts of attempted first degree murder and aggravated assault are multiplicitous. "Multiplicity is defined as charging a single offense in multiple counts." *State v. Bruni*, 129 Ariz. 312, 318, 630 P.2d 1044, 1050 (App. 1981). Ewing argues these counts are multiplicitous because they involve the "identical singular act of stabbing his victim in the back." Ewing, however, concedes he did not raise this issue below. Therefore, we review for fundamental error. *See State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991) (failure to raise an issue at trial waives all but fundamental error).

> To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial.

State v. Henderson, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). Once fundamental error has been established, a defendant must demonstrate the error was prejudicial. *Id*. at ¶ 26.

¶17 The question is not, as implied by Ewing, simply whether an act may be punished under more than one provision of the criminal code. To determine if counts are multiplicitous, the question is whether each count requires proof of a fact that the other count does not. *State v. Barber*, 133 Ariz. 572, 576, 653 P.2d 29, 33 (App. 1982), *aff'd*, 133 Ariz. 549, 653 P.2d 6 (1982). As charged in this case, a person commits aggravated assault if the person intentionally, knowingly, or recklessly causes any physical injury to another person and does so with a deadly weapon or dangerous instrument. A.R.S. §§ 13-1203(A)(1)

(2009), -1204(A)(2) (2009). As noted above, a person commits attempted first degree murder if, acting with the kind of culpability otherwise required for the commission of first degree murder, the person intentionally does anything which, under the circumstances as that person believes them to be, is any step in a course of conduct planned to culminate in the commission of first degree murder. *See* A.R.S. § 13-1001(A)(2). A person commits first degree murder if, intending or knowing the person's conduct will cause death, the person causes the death of another person with premeditation. *See* A.R.S. § 13-1105(A)(1).

¶18 We find no error, fundamental or otherwise, because each offense requires proof of at least one fact the other count does not. It will suffice to note that attempted first degree murder requires intentionally doing anything that is a step in a course of conduct planned to culminate in the commission of first degree murder. Aggravated assault, however, can be committed knowingly or recklessly. Further, as charged in this case, a conviction for aggravated assault required the infliction of a physical injury to another person through the use of a deadly weapon or dangerous instrument. Attempted first degree murder does not require the infliction of an injury nor does it require the use of a deadly weapon or dangerous instrument. Because each count required proof of a fact the other count did not, the counts for attempted first degree murder and aggravated assault were not multiplicitous.

III. The Jury Instructions

¶19 Ewing argues the trial court erred when it failed to correctly instruct the jury regarding the elements of attempted first degree murder and misconduct involving weapons. We review whether jury instructions properly state the law de novo. *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). "The purpose of jury instructions is to inform the jury of the applicable law . . . ." *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996). "A set of instructions need not be faultless; however, they must not mislead the jury in any way and must give the jury an understanding of the issues." *Id.* "It is only when the instructions, taken as a whole, are such that it is reasonable to suppose the jury would be misled thereby that a case should be reversed for error" in the instructions. *State v. Schrock*, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986) (quoting *State v. McNair*, 141 Ariz. 475, 481, 687 P.2d 1230, 1236 (1984)).

A. Attempted First Degree Murder

¶20 The jury was instructed in relevant part that the crime of attempted first degree murder requires proof that the defendant intentionally committed any act that was a step in a course of conduct that Ewing planned or believed would result in the commission of first degree murder. The jury was further instructed in relevant part that the crime of first degree murder requires proof that the defendant caused the death of another person and that the defendant intended to cause the death or knew he would cause the death. Ewing argues the instruction should not have included the "knew he would cause the death" language because the offense of attempt as charged in this case requires that the defendant act intentionally. *See* A.R.S. § 13-1001(A)(2). Ewing argues attempted first degree murder requires proof that he intentionally committed an act that was a step in a course of conduct that he believed would result in the commission of first degree murder committed intentionally, not first degree murder committed knowingly. Ewing argues that under Arizona law, one cannot intentionally attempt to commit a knowing first degree murder.

¶21 We find no error in the instructions regarding attempted first degree murder. We addressed this same issue in *State v. Nunez*, 159 Ariz. 594, 769 P.2d 1040 (App. 1989). After addressing the identical statutes at issue here, we held that a person may intentionally attempt to commit a knowing first degree murder under Arizona law. *Id.* at 597, 769 P.2d at 1043. This is because a conviction for attempt requires only that the defendant act intentionally in regard to the elements of attempt as defined in A.R.S. § 13-1001. A conviction for attempt does not require that the defendant also act intentionally in regard to every element of the attempted offense *unless* intent is itself the requisite *mens rea* for that offense. *Id*. Therefore, the jury instructions in this case correctly stated the Arizona law regarding attempted first degree murder.

B. Misconduct Involving Weapons

¶22 The jury instructions correctly stated the elements of misconduct involving weapons as identified in A.R.S. § 13-3102(A)(4). The instructions permitted a conviction for the offense based on the possession of either a "deadly or prohibited weapon." The instructions also correctly defined "deadly weapon" as "anything that is designed for lethal use," but omitted the additional sentence, "The term includes a firearm." The instructions did not, however, provide a definition for "prohibited weapon."

¶23 Ewing argues the omitted instructions "left the jury without adequate guidance to determine whether Appellant's possession of a knife satisfied the elements of [misconduct involving weapons]." Ewing's only specific claim of prejudice is that these omissions permitted the jury to convict him of a crime he did not commit because "it is not a violation of the statute to possess a knife." Ewing concedes, however, that he failed to object to the omission of these instructions below. "The failure to object to an instruction either before or at the time it is given waives any error, absent fundamental error." *Schrock*, 149 Ariz. at 440, 719 P.2d at 1056. Therefore, we review for fundamental error.

¶24 We find no error. For the reasons previously explained, Ewing's sole claim regarding how he was prejudiced is simply wrong; a prohibited possessor may be convicted of misconduct involving weapons based on the possession of a knife as a "deadly weapon." Ewing has, therefore, failed to prove the prejudice alleged. Despite the omissions, the instructions given adequately informed the jury of the applicable law regarding misconduct involving weapons based on the possession of a knife as a "deadly weapon," gave the jury an understanding of the issues, and were not misleading.

IV. Sentencing

¶25 Ewing argues the trial court erred when it imposed aggravated sentences for attempted first degree murder and aggravated assault. He further argues the court erred when it ordered the sentence for misconduct involving weapons to be served consecutively to the sentences for attempted murder and aggravated assault.

A. Mitigating Factors

¶26 The trial court found Ewing's "significant mental health" problems throughout his life, the support of his family, and his remorse were mitigating factors for sentencing purposes.

Ewing argues, however, that the trial court "ignored" and/or "refused" to consider other mitigating factors. Specifically, Ewing argues the court failed to consider "uncontested evidence" that he was intoxicated at the time he committed the offenses and that this intoxication lead directly to his illegal conduct; that Ewing was an alcoholic who self-medicated rather than take medication prescribed for his mental health issues; or that Ewing was "mentally retarded" and did not comprehend what he had done or why he had done it.

¶27 "The trial court has the discretion to weigh aggravating and mitigating factors." *State v. Harvey*, 193 Ariz. 472, 477, ¶ 24, 974 P.2d 451, 456 (App. 1998). Because Ewing did not object to the court's alleged failure to consider these factors, we review for fundamental error. Even so, we find no error, fundamental or otherwise. A trial court need not find mitigating factors simply because evidence of those factors is presented; the court is only required to consider those factors. *State v. Jenkins*, 193 Ariz. 115, 121, ¶ 25, 970 P.2d 947, 953 (App. 1998). Ewing presented the following mitigating factors for the court's consideration: he was allegedly mentally retarded and had suffered unidentified mental illness and "brain damage" since he was a child, he had ADHD, he had been rejected by his mother and other members of his family early in his life, and he was an alcoholic who self-medicated. Ewing also spoke at sentencing and claimed he was intoxicated when he committed the offenses. There is nothing in the record to suggest the trial court did not consider all of these factors, and, as noted above, nothing more was required.

¶28 Further, the trial court noted it considered all the trial testimony in its determination of the appropriate sentences. In regard to the mitigating factors Ewing claims the court failed and/or refused to consider, the evidence considered by the court included testimony that (1) Ewing was an alcoholic, (2) he was a high school dropout who had learning disabilities, (3) he was bipolar and had a "split personality," (4) he sometimes displayed the mentality of a child, (5) he had been on medication for various mental conditions since he was a child, (6) he was in counseling, (7) he self-medicated and preferred to drink alcohol rather than take his medications, and (8) he had been admitted to mental hospitals twice in his lifetime. The evidence also included testimony from a psychologist who testified Ewing had "mild mental retardation." The court noted it also considered an additional psychological evaluation of Ewing that Ewing submitted as mitigating evidence. Again, there is nothing in the record to suggest the trial court failed to consider any of these factors.

¶29 As far as the "uncontested evidence" that Ewing was intoxicated when he committed the offenses and/or that intoxication contributed to or caused the offenses, the only evidence regarding intoxication admitted at trial was that Ewing's aunt saw him several hours after the attack and that he appeared intoxicated to her at that time. There was no evidence Ewing was intoxicated at the time he committed the offenses. Even so, there is nothing in the record to suggest the court refused and/or failed to otherwise consider Ewing's claim at sentencing that he was intoxicated when he committed the offenses.

B. Aggravating Factors

¶30 Ewing next contends the trial court erred when it improperly considered various aggravating factors for sentencing purposes. We review the imposition of an aggravated sentence within the range established by the legislature for abuse of discretion. *State v. Tschilar*, 200 Ariz. 427, 435, ¶ 32, 27 P.3d 331, 339 (App. 2001).

¶31 The court found the attempted murder and the aggravated assault were especially heinous, cruel or depraved. *See* A.R.S. § 13-701(D)(5) (2009). Ewing first argues the trial court improperly considered this factor twice. The record shows the court did not consider this aggravating factor twice, but that the court simply gave more than one reason for why the offenses were especially heinous, cruel or depraved.

¶32 Ewing argues the trial court also improperly considered the victim's "pain" as an aggravating factor twice – first as an "unarticulated circumstance" and then as an additional reason to find the offenses were especially heinous, cruel or depraved. The record shows the court considered the victim's "pain" in only one context - as a factor for why the offenses were especially heinous, cruel or depraved. While the court also found the physical, emotional and financial "harm" to the victim was an aggravating factor, physical "harm" is not synonymous with "pain." Even if the court had considered the victim's pain twice, a single fact may be used to establish more than one aggravating factor. *State v. Prince*, 226 Ariz. 516, 537, ¶ 81, 250 P.3d 1145, 1166 (2011). The only prohibition is against weighing that single factor twice in the balance of the aggravating and mitigating circumstances. *Id*. There is no evidence the trial court weighed the victim's pain twice.

¶33 Ewing also argues the court considered the infliction of serious physical injury as an aggravating factor even though it was an element of the offense of aggravated assault. *See* A.R.S. § 13-701(D)(1) (infliction of serious physical injury may be considered as an aggravating factor unless it is an element of the offense or has been used for sentence enhancement). We review de novo whether an aggravating factor is an element of the offense and whether the trial court may consider that factor for purposes of sentence aggravation. *Tschilar*, 200 Ariz. at 435, ¶ 32, 27 P.3d at 339. Here, we find no error. The assault in this case was aggravated because it involved the use of a deadly weapon. The infliction of "serious physical injury" was not an element of the offense. *See* A.R.S. § 13-1204(A)(2). Therefore, the trial court could consider the infliction of serious physical injury as an aggravating factor for sentencing purposes.[4]

¶34 Finally, Ewing argues the trial court improperly considered the possession of a deadly weapon as an aggravating factor for the count of aggravated assault because it was an element of the offense. *See* A.R.S. § 13-701(D)(2) (possession of a deadly weapon may be considered as an aggravating factor unless it is an element of the offense or has been used for purposes of sentence enhancement pursuant to § 13-704). The trial court explained that it believed it could consider possession of a deadly weapon as an aggravating factor because Ewing's sentences were enhanced based on the repetitive offender provisions of § 13-703, not the dangerous offender provisions of § 13-704. As noted above, A.R.S. § 13-701(D)(2) references sentence enhancement in the context of § 13-704, not § 13-703.

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[4] Below, Ewing expressly informed the trial court it could consider the infliction of serious physical injury as an aggravating factor for an aggravated assault based on the use of a deadly weapon. In fact, Ewing said, "the court has to count it as an aggravator[.]"

¶35 We first note that the trial court found "possession" of a deadly weapon was an aggravating factor, while Ewing was charged with and found guilty of aggravated assault based on his "use" of a deadly weapon. "Possession" and "use" are not the same thing. "Possession" is a statutorily defined term, while "use" is not statutorily defined. *See* A.R.S. § 13-105(34) ("'Possession' means a voluntary act if the defendant knowingly exercised dominion or control over property."). Further, mere "possession" of a deadly weapon is not an element of aggravated assault as defined in A.R.S. § 13-1204(A)(2). The State attempts to concede error and in turn argue that any error was harmless, but does so based on the erroneous contention that the court improperly considered the "use" of a deadly weapon as an aggravating factor. We further note that Ewing expressly informed the court at sentencing that the court could consider the "use" of a deadly weapon as an aggravating factor, even though "use" of a deadly weapon was an element of the offense.

¶36 We need not address whether a trial court may consider "possession" of a deadly weapon as an aggravating factor when "use" of a deadly weapon was an element of the offense, nor need we determine whether the trial court was actually attempting to make a distinction between "possession" of a deadly weapon and "use" of a deadly weapon for purposes of sentence aggravation. Where, as here, a defendant fails to object to a trial court's consideration of an aggravating factor for sentencing purposes, the burden is on the defendant to prove prejudice resulted from the use of the allegedly improper factor. *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006). Here, Ewing has failed to prove he was prejudiced.

¶37 As aggravating factors for the aggravated assault as well as the attempted murder, the court found Ewing caused a "great deal" of physical, emotional, and financial harm to the victim and her family. The court further found the offense was especially heinous, cruel or depraved because of the manner in which Ewing attacked the victim, the amount of pain he inflicted, the fact that Ewing relished both the stabbing and the infliction of pain, and the fact that Ewing later wrote a letter to his father in which he stated not only that he had no remorse for what he did, but that he wished he could stab another woman. The court further found Ewing's 21 prior misdemeanor convictions to be an aggravating factor. Finally, as noted above, the court found the infliction of a "serious physical injury" and the "possession" of a deadly weapon were aggravating factors. The court found the aggravating factors outweighed the mitigating factors and that the aggravated assault warranted the "aggravated" term of 16.25 years' imprisonment.[5]

¶38 The record shows the trial court's focus was on the harm Ewing caused the victim and the factors which rendered the offense especially heinous, cruel or depraved. That Ewing "possessed" a deadly weapon was among the least important factors – if not the least important factor - in the court's consideration, and there is nothing in the record to indicate the possession of a deadly weapon was the factor which caused the court to impose the aggravated sentence for aggravated assault. Because Ewing has failed to show the trial court would have imposed a lesser sentence if this single additional factor were omitted from the court's consideration, Ewing has failed to show he was prejudiced.

C. The Imposition of a Consecutive Sentence

¶39 For the offense of misconduct involving weapons, the trial court found no aggravating factors were applicable because the offense was separate and distinct from the other two offenses. The court imposed the presumptive sentence of 4.5 years' imprisonment and ordered that the sentence be served consecutively to the concurrent sentences for attempted first

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[5] Ewing was sentenced pursuant to the version of A.R.S. § 13-703 that was revised in 2008 to provide defined "mitigated," "minimum," "presumptive," "maximum" and "aggravated" terms of imprisonment.

degree murder and aggravated assault. As the last sentencing issue on appeal, Ewing argues the trial court erred when it ordered the sentence for misconduct involving weapons to be served consecutively. Ewing argues the court did not properly analyze the facts of the offense and contends that all three offenses were a single, indistinguishable act: that it was factually impossible to commit murder or aggravated assault without also possessing the knife. *See* A.R.S. § 13-116 (2009) (an act punishable under more than one section of the criminal code may be punished under both, but the sentences imposed must be concurrent). We review de novo whether consecutive sentences are permissible. *State v. Siddle*, 202 Ariz. 512, 517, ¶ 16, 47 P.3d 1150, 1155 (App. 2002).

¶40 The attempted murder and aggravated assault were alleged and proven to have occurred on October 30, 2009. The offense of misconduct involving weapons was alleged to have occurred on or between October 30, 2009 and November 4, 2009. While the victim testified she saw Ewing flee the store holding a knife, the evidence introduced at trial showed police found Ewing in possession of the knife when they searched his room on November 4, 2009. Based on this evidence, the trial court found the offense of misconduct involving weapons was a separate and distinct offense.

¶41 We find no error. While the verdict form did not require the jury to identify the date Ewing possessed the knife, the date of the offense is not an element of misconduct involving weapons. *See* A.R.S. § 13-3102(A)(4). Therefore, it was not necessary to have the jury determine the date of the offense beyond a reasonable doubt. The evidence introduced at trial established Ewing possessed the knife on November 4, 2009. This was sufficient to permit the trial court to find the offense was a separate and distinct offense and, in turn, impose a consecutive sentence.[6] *See* A.R.S. § 13-711 (2008) (except as otherwise provided by law, multiple sentences shall run consecutively unless the court expressly directs otherwise and sets forth its reasons for doing so on the record).

[6] Despite Ewing's assertion to the contrary, there is nothing in the record to suggest the trial court believed a consecutive sentence was mandatory.

Conclusion

¶42 Because we find no error, we affirm Ewing's convictions and sentences.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

ANN A. SCOTT TIMMER, Presiding Judge

/s/

PATRICK IRVINE, Judge