

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);  
Ariz.R.Crim.P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 12/15/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

STATE OF ARIZONA,

Appellee,

v.

LEVETT MICHELLE PUGH,

Appellant.

1 CA-CR 11-0096

DEPARTMENT A

**MEMORANDUM DECISION**

(Not for Publication -  
Rule 111, Rules of the  
Arizona Supreme Court)

Appeal from the Superior Court in Coconino County

Cause No. CR 2010-0233

The Honorable Mark R. Moran, Judge

**AFFIRMED**

---

Thomas C. Horne, Attorney General  
by Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Division  
and Aaron J. Moskowitz, Assistant Attorney General  
Attorneys for Appellee

Phoenix

Coconino Public Defender  
by H. Allen Gerhardt  
Attorneys for Appellant

Flagstaff

---

**I R V I N E**, Judge

¶1 Levett Michelle Pugh appeals her conviction and sentence for one count of aggravated assault. For the reasons that follow, we affirm.

#### FACTS AND PROCEDURAL HISTORY

¶2 On appeal, we view the facts in the light most favorable to sustaining the verdict. *See State v. Haight-Gyuro*, 218 Ariz. 356, 357, ¶ 2, 186 P.3d 33, 34 (App. 2008). On September 6, 2009, Pugh and Desiree P. drove to Desiree's aunt's house. Once inside, Pugh immediately accused A.S. of being a snitch. Pugh continued calling A.S. a snitch for several minutes before she eventually drove away from the home with Desiree.

¶3 While driving, Pugh convinced Desiree to return to the home to "get" A.S. Back inside the home, Desiree walked behind the couch where A.S. was sitting and placed a rope tightly over her neck, causing her to choke. Pugh called A.S. a snitch while instructing Desiree to continue choking A.S. The rope was on A.S.'s throat for about a minute before Desiree was eventually pulled away. The rope left scars near A.S.'s neck.

¶4 In March 2010, the State filed an information charging Pugh with one count of aggravated assault for causing physical injury to a restrained victim, a class 6 felony.<sup>1</sup> Prior to trial, the State alleged two prior felony convictions and filed a

---

<sup>1</sup> The State also charged Pugh with one count of aggravated assault with a deadly weapon, a class 3 felony, but that charge was dismissed before trial.

notice of aggravating factors, alleging that the victim suffered emotional harm. A jury trial was held in Pugh's absence after she failed to appear for trial. The jury found Pugh guilty as charged. The jury then found the aggravating circumstance of emotional harm to the victim.

¶15 During sentencing, the State proved that Pugh had two prior felony convictions, and the court acknowledged the jury's finding that the victim suffered emotional harm. The court found two additional aggravating circumstances and noted that it was not considering Pugh's two prior felony convictions as aggravators. The court found one mitigating circumstance. The court weighed the three aggravating circumstances against the one mitigating circumstance and sentenced Pugh to the slightly aggravated "maximum" sentence of 4.5 years in prison for a class 6 felony with two historical prior felony convictions. Arizona Revised Statutes ("A.R.S.") section 13-703(C), (J) (2009).

¶16 Pugh timely appeals.

#### **DISCUSSION**

¶17 Pugh contends that A.R.S. § 13-701(C) (2009) requires the State to allege all aggravating circumstances *before trial*. (Emphasis added.) Pugh asserts that because the State alleged only one aggravator before trial, it was error for the court to find two additional aggravators. Because Pugh failed to raise

the issue below, we review for fundamental error. *State v. Martinez*, 209 Ariz. 280, 283, ¶ 9, 100 P.3d 30, 33 (App. 2004).

¶8 Arizona Revised Statutes § 13-701(C) states, "The minimum or maximum term . . . may be imposed only if one or more of the circumstances *alleged* to be in aggravation of the crime are found to be true by the trier of fact beyond a reasonable doubt or are admitted by the defendant." (Emphasis added.) Pugh argues that use of the word "alleged" evidences a legislative intent that the State be required to formally allege all aggravators before trial. Pugh cites no other statutes or cases in support of her argument.

¶9 We find no error, fundamental or otherwise. Although A.R.S. § 13-701(C) requires the State to "allege" aggravating circumstances, it does not state *when* the State must allege aggravating factors. Thus, despite Pugh's claim, A.R.S. § 13-701(C) does not require the State to allege all aggravating circumstances before trial. If the legislature wanted to require the State to allege all aggravators before trial, it could have done so. See A.R.S. § 13-703(N) (2009) (expressly requiring that allegations of prior convictions be alleged before trial).

¶10 The State filed its sentencing memorandum alleging six aggravators two days before the sentencing hearing. Accordingly, we find that the State complied with A.R.S. § 13-701(C) and satisfied its obligation to provide notice to Pugh of its intent

