FILED BY CLERK
APR -1 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. EUGENIO JIMENEZ NORZAGARAY, Appellant.	)	2 CA-CR 2011-0266 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093106001

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Kathryn A. Damstra
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin
Tucson
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, Eugenio Norzagaray was convicted of kidnapping and sexual assault. On appeal, he contends the trial court erred by denying his motion to compel a potential witness to submit to an interview by defense counsel, by finding that

he was "on parole" at the time of the offense, and by finding the facts necessary to increase the statutory minimum sentence. Because we find no error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the conviction. *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). In June 2009, Norzagaray pulled H.R. inside his brother's residence, pulled off her shorts, and sexually assaulted her. After Norzagaray let go of H.R., she ran out the back door and borrowed a neighboring resident's telephone to call F.T., her boyfriend, and J.O., Norzagaray's brother. Without H.R.'s involvement, F.T., J.O., and Norzagaray reached an agreement that H.R. would not call the police if Norzagaray gave F.T. his gun. Based on this agreement, F.T. pressured H.R. not to call. Nonetheless, a day later H.R. contacted police and medical personnel.

¶3 Norzagaray was charged with kidnapping, two counts of sexual assault, sexual abuse, and possession of a deadly weapon by a prohibited possessor. After a mistrial, a second trial resulted in convictions for kidnapping and one count of sexual assault, acquittals for sexual abuse and the other count of sexual assault, and the eventual dismissal without prejudice of the prohibited possessor charge. He was sentenced to concurrent, presumptive prison terms of 15.75 years for each count. Norzagaray appeals from his convictions and sentences. We have jurisdiction pursuant to A.R.S. §§ 12-120.01 and 13-4033(A)(1), (4).

Unavailable Witness

¶4 Norzagaray first argues the trial court erred by denying his motion to compel H.R.'s boyfriend, F.T., to submit to a pre-trial interview without conducting case-specific fact-finding. We review a trial court's denial of a motion to compel a witness who will invoke his right to remain silent to submit to a pretrial interview for an abuse of discretion. *See State v. Harrod*, 218 Ariz. 268, ¶ 19, 183 P.3d 519, 526 (2008); *State v. Carlos*, 199 Ariz. 273, ¶ 20, 17 P.3d 118, 124 (App. 2001) (defendant entitled to court's assistance with pretrial interviews).

¶5 Criminal defendants enjoy the "'right to offer the testimony of witnesses, and to compel their attendance, if necessary,' in order to present a defense." *Harrod*, 218 Ariz. 268, ¶ 20, 183 P.3d at 527, *quoting Washington v. Texas*, 388 U.S. 14, 19 (1967). However, when a witness properly invokes his Fifth Amendment right to remain silent, "'the defendant's right to compulsory process must yield to the witness's privilege not to incriminate himself.'" *State v. Rosas-Hernandez*, 202 Ariz. 212, ¶ 10, 42 P.3d 1177, 1181 (App. 2002), *quoting State v. Mills*, 196 Ariz. 269, ¶ 31, 995 P.2d 705, 712 (App. 1999).

¶6 So long as the trial judge has "extensive knowledge" of the case that would allow a determination that the witness could properly invoke the right to remain silent to all potential questions, the court may deny compulsory process for that witness. *State v. McDaniel*, 136 Ariz. 188, 194, 665 P.2d 70, 76 (1983), *abrogated on other grounds by State v. Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989). A judge possesses "extensive knowledge" when the judge is familiar with the prosecution's theory of the case or has

heard the state's case and a portion of the defendant's. *See Harrod*, 218 Ariz. 268, ¶¶ 21-22, 183 P.3d at 527. When the judge possesses that knowledge, the judge need not "personally question the witness, conduct a hearing, or allow counsel to call the witness to the stand." *Id.* ¶ 21.

¶7 In his original motion to compel, Norzagaray alleged that F.T. and H.R. offered not to call the police in exchange for money. He pointed to no other basis for interviewing F.T. At the hearing on the motion, Norzagaray chose to forgo any further argument, and the judge denied the motion, reasoning that "the way I understand the facts and the theory that the defense has, [F.T.] could be incriminating himself if he were subjected to an interview." On retrial, Norzagaray renewed his motion to compel an interview of F.T and the same judge denied it again on the same basis.

¶8 After presiding over the entire first trial and making his ruling at the outset of the second, the trial judge here possessed the requisite "extensive knowledge" of the case and the theories advanced by both the prosecution and defense to determine whether F.T. could properly invoke his right to remain silent. Therefore the court did not need to personally question F.T. or put him on the stand. *See Harrod*, 218 Ariz. 268, ¶¶ 21-22, 183 P.3d at 527. Moreover, as the state points out, the only proposed area of examination presented in the renewed motion could implicate F.T. in theft by extortion or conspiracy to commit theft by extortion. *See* A.R.S. §§ 13-1003(A), 13-1804(A)(5).

¶9 Norzagaray contends, however, that *Carlos* is controlling and requires us to reach a different conclusion because there we held the trial court was required to compel an uncooperative witness to appear in court and submit to questioning about his intent to

cooperate. 199 Ariz. 273, ¶¶ 18-22, 17 P.3d at 123-24. But in that case the trial court based its decision not to compel the witness to appear on the assumption that the witness would not cooperate, *id.* ¶ 19; here, however, F.T.'s attorney appeared in court and properly invoked his right to remain silent. As Norzagaray points out, the trial court's original ruling would have remained in effect under the procedural rules or as the law of the case. *See* Ariz. R. Crim. P. 16.1(d) ("Except for good cause, or as otherwise provided by these rules, an issue previously determined by the court shall not be reconsidered."); *State v. King*, 180 Ariz. 268, 278, 883 P.2d 1024, 1034 (1994) (decision of court serves as law of case provided facts and issues "substantially the same as those on which the first decision rested"), *quoting In re Monaghan's Estate*, 71 Ariz. 334, 336, 227 P.2d 227, 228 (1951). And the renewed motion provided no new basis for reviewing the prior ruling.

¶10 Norzagaray further argues the trial court failed to determine F.T. "could invoke the Fifth Amendment in response to all the prospective questioning." However, he failed to make this argument below in his initial motions or a motion to reconsider at either the first or second trial, and has therefore waived this argument on appeal absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). Furthermore, because Norzagaray does not argue on appeal that the error is fundamental, and because we find no error that can be so characterized, he has waived this argument. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on

appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it). Under these circumstances, we cannot say the court abused its discretion in determining F.T. had properly invoked his right to remain silent and in denying the motion to compel.

Sentencing

¶11 Norzagaray next argues the trial court erred by sentencing him to presumptive prison terms because it did so after mistakenly finding he was "on parole" and therefore ineligible for mitigated prison terms. Because Norzagaray did not object below, we review for fundamental, prejudicial error. *See State v. Valverde*, 220 Ariz. 582, ¶ 12, 208 P.3d 233, 236 (2009). To prevail under this standard of review, the defendant must show both that the error was fundamental and that it prejudiced him. *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶12 Under A.R.S. § 13-708(C), a defendant who commits a non-dangerous felony while "on probation for a conviction of a felony offense or parole, work furlough, community supervision or any other release or escape from confinement for conviction of a felony offense" must be sentenced to at least the presumptive term of imprisonment. "The sentencing statute only requires that [a] defendant be on some form of early release." *State v. Hudson*, 158 Ariz. 455, 457, 763 P.2d 519, 521 (1988). A trial court does not commit error by misstating the type of a defendant's early release status when determining the minimum sentence for which the defendant is eligible. *State v. Bruggeman*, 161 Ariz. 508, 511, 779 P.2d 823, 825 (App. 1989).

¶13 The trial court found that Norzagaray was "on parole" although that term to describe early release was abandoned for offenses committed after December 31, 1993. *See* A.R.S. § 41-1604.09(I). His parole officer testified at the sentencing hearing that Norzagaray was on supervised release beginning in October 2008 until he absconded two months later. This release was from a conviction of felony misconduct involving weapons. The state therefore presented sufficient evidence establishing Norzagaray had been "on some form of early release" when he committed these crimes and the presumptive sentences were the lowest the court could impose. *See Hudson*, 158 Ariz. at 457, 763 P.2d at 521; § 13-708(C). The parties used the terms "supervised release" and "parole" interchangeably at the hearing and the court merely adopted that terminology. Accordingly, the court did not err in finding that anything less than presumptive prison terms were unavailable to Norzagaray.

¶14 Norzagaray finally contends that under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the jury, not the trial court, was required to find he had been on some form of early release before the presumptive prison term could be established as the minimum term the court could impose pursuant to § 13-708(C). But he concedes that "under existing Supreme Court and Arizona . . . jurisprudence, it was proper for the trial court to make the on-release finding in [this] case." We review unobjected-to sentences for fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 19, 25, 115 P.3d at 607, 608. This court has held that consistent with *Apprendi*, trial courts may make on-release findings that raise the mandatory minimum penalty to the presumptive prison term. *State v. Flores*, 201 Ariz. 239, ¶ 8, 33 P.3d 1177, 1179 (App. 2001). We therefore find no

error here, fundamental or otherwise. Based on the fact that the United States Supreme Court has granted certiorari in a case in which this issue has been raised, Norzagaray invites us to preemptively overrule *Flores* and related cases. We decline the invitation. *See State v. Keith*, 211 Ariz. 436, ¶ 3, 122 P.3d 229, 230 (App. 2005) (appellate courts may not anticipate how Supreme Court will rule in future).

Conclusion

¶15 For the foregoing reasons, we affirm Norzagaray's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Michael Miller
MICHAEL MILLER, Judge