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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. VINCENT EUGENE COBB, Appellant.	)	2 CA-CR 2012-0053 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20104272001

Honorable Clark W. Munger, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 After a jury trial, appellant Vincent Cobb was convicted of aggravated assault with a deadly weapon or dangerous instrument, aggravated assault causing temporary but substantial disfigurement, criminal damage, and third-degree burglary. He was sentenced to a combination of concurrent and consecutive maximum[1] sentences totaling thirty-eight years. On appeal, he argues the trial court erred in refusing to give his requested jury instruction on criminal negligence and in finding the state had proven he had three historical prior felony convictions. He also maintains the court erred in aggravating his sentences, and his combined sentence violated the prohibition against cruel and unusual punishment and was excessive. We affirm.

Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In October 2010, victim K.C. noticed a man, later identified as Cobb, in her fenced backyard. K.C. called out and Cobb jumped over the fence and ran toward his car, which he had backed into K.C.'s carport. At that moment, K.C.'s husband G.C. arrived home, saw the unfamiliar car in the carport, and parked in front of it. When G.C. got out of his vehicle, Cobb approached him and tried unsuccessfully to take his keys. Cobb then entered his own car,

[1]The trial court's sentencing minute entry describes the sentence imposed on the aggravated assault with a deadly weapon/dangerous instrument count as "aggravated." However, it appears the court imposed the maximum, rather than aggravated, sentence on this count. *See* A.R.S. § 13-703(J).

accelerated, and struck G.C., pinning him between the two vehicles and injuring his leg. Cobb backed up, accelerated, and again struck G.C. with his car. He eventually pushed G.C.'s vehicle out of the way and fled. After Cobb was located and arrested, he was charged and convicted as noted above. This appeal followed his sentencing.

Discussion

Jury Instruction

¶3 Cobb argues the trial court erred in refusing to give his proposed jury instruction on criminal negligence. We review a court's denial of a requested jury instruction for abuse of discretion. *State v. Dann*, 220 Ariz. 351, ¶ 51, 207 P.3d 604, 616-17 (2009). A defendant is entitled to a jury instruction "on any theory reasonably supported by the evidence." *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). Jury instructions are viewed as a whole to determine if they "adequately reflect the law." *State v. Gallegos*, 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994). And, "[a] trial court . . . does not err in refusing to give a jury instruction that is an incorrect statement of the law, does not fit the facts of the particular case, or is adequately covered by the other instructions." *State v. Hussain*, 189 Ariz. 336, 337, 942 P.2d 1168, 1169 (App. 1997). In determining whether the evidence warranted a particular instruction, we view the evidence in the light most favorable to the instruction's proponent. *State v. King*, 225 Ariz. 87, ¶ 13, 235 P.3d 240, 243 (2010).

¶4 To prove the aggravated assault charges the state was required to establish that Cobb, at a minimum, had acted recklessly in injuring G.C. *See* A.R.S. § 13-1204(B).

At trial, Cobb contended he had injured G.C. negligently rather than recklessly and requested an instruction defining criminal negligence as failure to "perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists." The trial court concluded the evidence did not support the instruction and refused to give it.

¶5 On appeal, Cobb argues a negligence instruction reasonably was supported by the evidence because he had panicked while fleeing and therefore was not aware of the risk to G.C. But, Cobb did not testify at trial as to his mental state, and the record does not support his claim.[2] Rather, the evidence plainly showed that Cobb had been aware of G.C.'s presence and had risked hurting him by twice driving his vehicle into him. Upon reaching the driveway, Cobb struggled with G.C. and attempted to take his keys. K.C. testified G.C. had been in front of Cobb's vehicle and "within view of the windshield" when Cobb accelerated into him. Based on this, G.C. believed Cobb was "probably trying to kill [him]." After G.C. was struck, he yelled for his wife to call 9-1-1, and Cobb then backed his vehicle up and rammed into him again. Accordingly, the evidence did not reasonably support Cobb's theory that he had failed to perceive the risk that G.C. would be injured, *Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d at 1009, and the trial court properly refused to instruct the jury on criminal negligence. *Dann*, 220 Ariz. 351, ¶ 51, 207 P.3d at 616-17.

[2]Cobb points only to testimony that G.C., as the victim of the aggravated assaults, had panicked, and argues this constituted sufficient evidence to infer that Cobb also had panicked and was unaware of the risk. We disagree.

Prior Convictions

¶6 Cobb claims the trial court erred in concluding the state had presented sufficient evidence to establish he had historical prior felony convictions. A trial court's determination that a prior conviction is a historical prior conviction for enhancement purposes is a mixed question of law and fact, and we review the court's ultimate legal conclusion de novo. *State v. Rasul*, 216 Ariz. 491, ¶ 20, 167 P.3d 1286, 1291 (App. 2007).

¶7 The state must provide clear and convincing evidence of historical prior felony convictions before a trial court may enhance a defendant's sentence. *State v. Cons*, 208 Ariz. 409, ¶ 15, 94 P.3d 609, 615 (App. 2004). "The proper procedure for establishing a prior conviction is for the state to submit a certified copy of the conviction and establish that the defendant is the person to whom the document refers." *Id.* ¶ 16.

¶8 At the prior convictions trial, the state alleged Cobb had three historical prior felony convictions and offered into evidence certified copies of the sentencing documents for each conviction as well as an Arizona Department of Corrections "pen pack" containing evidence of the historical felony convictions. The state also presented testimony from Cobb's parole officer that the documents referred to Cobb. After taking the matter under advisement, the trial court concluded the state had proven the prior convictions.

¶9 Cobb did not object to the admission of the pen pack and sentencing documents at trial, and does not challenge their validity on appeal. Instead, he argues the

state failed to present clear and convincing evidence he was the person referred to in the documents. *See Cons*, 208 Ariz. 409, ¶ 16, 94 P.3d at 615. Specifically, he contends the evidence was insufficient because the parole officer did not compare his fingerprints to those on the documents, gave no "probative descriptors," and did not check his social security number against the convictions.

¶10 We conclude the evidence was sufficient to establish Cobb was the person referred to in the sentencing documents. The parole officer identified Cobb in court and testified she had been supervising him at the time he committed the current offenses. And, although the parole officer did not compare Cobb's fingerprints to those on the sentencing documents, prior convictions "can be proved by many different forms of evidence," *see State v. Terrell*, 156 Ariz. 499, 503, 753 P.2d 189, 193 (App. 1988), and fingerprint evidence is not necessary where other evidence sufficiently connects the defendant with the prior convictions, *State v. Van Adams*, 194 Ariz. 408, ¶ 37, 984 P.2d 16, 27 (1999); *State v. Jones*, 103 Ariz. 580, 581, 447 P.2d 554, 555 (1968).

¶11 Further, although the parole officer did not give a physical description of Cobb in court, she explained he had provided her with his Arizona Department of Corrections (ADOC) number and from this she had access to his photograph and description in the ADOC database. She testified that both the photograph and description of the inmate identified as Cobb matched the person she had supervised and identified in court. This evidence was ample support for the court's conclusion that the state had

proven Cobb was the person to whom the documents referred.[3] *See State v. Hauss*, 140 Ariz. 230, 231 n.1, 681 P.2d 382, 383 n.1 (1984) (testimonial evidence sufficient to establish defendant is person named in prior convictions); *cf. State v. Strong*, 185 Ariz. 248, 251, 914 P.2d 1340, 1343 (App. 1995) (parole officer's testimony defendant on parole and certified copies of documents showing convictions "more than sufficient" to establish defendant on parole at time of offense).

Sentencing

Statutory Aggravating Factor

¶12 Cobb argues the trial court "failed to articulate a statutory aggravator" and therefore erred in imposing maximum sentences on each count. The state argues, and Cobb concedes, he did not raise this claim in the trial court and, accordingly, he has forfeited the right to relief absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). But, as we have held, the imposition of an illegal sentence constitutes fundamental error. *State v. Gonzalez*, 216 Ariz. 11, ¶ 2, 162 P.3d 650, 651 (App. 2007).

[3]Cobb also asserts the identification was insufficient because the parole officer's "understanding of [his] identity was based on an introduction from her supervisor." But the parole officer explained that following her supervisor's introduction of Cobb by name, Cobb had provided her with his ADOC number and she had confirmed his identity using his photograph and description in the ADOC database. And, to the extent Cobb claims the identification was deficient because the parole officer did not testify regarding his social security number, he has provided no authority that such a procedure is required. *See Terrell*, 156 Ariz. at 503, 753 P.2d at 193.

¶13 At sentencing, the trial court noted the state had proven two or more historical prior felony convictions associated with each count. The parties then presented their sentencing recommendations, and the court found as aggravating factors Cobb's "criminal history" and his having committed the offenses while on release.[4] The court concluded the aggravating factors outweighed the mitigating factors and imposed the maximum sentence on each count.

¶14 Section 13-701(D), A.R.S., sets forth the aggravating factors a trial court may consider in imposing sentence. If the court finds one statutory aggravating factor, such as a historical prior felony conviction, *see* § 13-701(D)(11), it then may consider other aggravating factors under the "catch-all" provision found in § 13-701(D)(24). *State v. Schmidt*, 220 Ariz. 563, ¶ 11, 208 P.3d 214, 217 (2009). A court may not, however, impose an aggravated sentence based solely on the existence of aggravating factors encompassed by the "catch-all" provision until at least one specific, statutorily enumerated aggravating factor has been properly established. *Id*. ¶¶ 10-11.

¶15 Cobb asserts that all the aggravating factors relied upon by the trial court fall under the catch-all provision of § 13-701(D)(24) because, although the court found proven his historical felony convictions for enhancement purposes, it did not cite them

[4]Cobb also asserts the trial court erred in considering his drug addiction as an aggravating circumstance. But, the court did not list his addiction as an aggravating factor; instead, after pronouncing sentence it stated it was "sorry for [Cobb's] addiction, but [could not] responsibly place [him] back amongst the population." We therefore reject this argument.

specifically as a factor in imposing aggravated sentences but instead referred to Cobb's "criminal history." Citing *Schmidt*, he concludes the aggravated sentences violate due process and must be reversed.

¶16 Our supreme court recently addressed this issue in *State v. Bonfiglio*, ___ Ariz. ___, 295 P.3d 948 (2013). The court held that while *Schmidt* permits a trial court to use a "catch-all" aggravator to impose a sentence up to the statutory maximum once a specifically enumerated aggravating factor properly has been found, the court is not required to indicate expressly that it is relying on the properly found statutory aggravator. *Id*. ¶¶ 1, 11, 15. Here, as in *Bonfiglio*, the trial court found proven Cobb's historical prior felony convictions based on the record at sentencing. *See id*. ¶ 11. The court thus was permitted to consider other aggravating circumstances under the "catch-all" provision without expressly stating it was relying on § 13-701(D)(11) as a basis for increasing the sentence. *Id*. Accordingly, we find no error.[5]

[5]Cobb also claims the trial court erred in relying on his on-release status as an aggravating factor because it already had been applied to require that no less than the presumptive sentence be imposed on each count. *See* A.R.S. § 13-708(C). But, Cobb has cited no authority, and we are aware of none, prohibiting the court from using his release status as an aggravating factor under § 13-701(D)(24). Rather, § 13-701(D)(24) provides the court may consider "[a]ny other factor that the state alleges is relevant." *State v. LeMaster*, 137 Ariz. 159, 166, 669 P.2d 592, 599 (App. 1983) (trial court may use prior conviction to enhance sentence and as aggravating circumstance); *see also State v. Cox*, 201 Ariz. 464, ¶ 18, 37 P.3d 437, 442 (App. 2002) (proof of on-release allegation increases statutory minimum penalty, not statutory maximum); *State v. Clough*, 171 Ariz. 217, 225, 829 P.2d 1263, 1271 (App. 1992) (trial court may consider fact defendant committed "crime while on release from another conviction" as aggravating circumstance).

Burglary and Criminal Damage Sentences

¶17 Cobb claims the trial court erred because, although it found his criminal history and on-release status were aggravating factors and cited them specifically in sentencing him on the aggravated assault counts, it did not again specify that these factors also were used to impose maximum sentences on the burglary and criminal damage counts. But, although the court is required to "give thought to whether or not each sentence . . . is appropriate," *see State v. Holstun*, 139 Ariz. 196, 197, 677 P.2d 1304, 1305 (App. 1983), it is not required to restate the sentencing factors it has already found when it pronounces sentence for each separate count. *See* § 13-702(C) (requiring only that court set forth "factual findings and reasons in support . . . on the record at the time of sentencing").

¶18 Moreover, as Cobb acknowledges, the trial court's sentencing minute entry indicates the aggravating factors apply to each count. Cobb is correct that when an express conflict exists between the oral pronouncement of sentence and the sentencing minute entry, the oral pronouncement generally controls. *See State v. Leon*, 197 Ariz. 48, n.3, 3 P.3d 968, 969 n.3 (App. 1999). But, when, as here, something is omitted from the oral pronouncement of sentence but is present in the sentencing minute entry, we may give "greater weight to the minute entry than to a conflicting, silent transcript." *State v. Gelden*, 126 Ariz. 232, 232, 613 P.2d 1288, 1288 (App. 1980); *see also State v. Rockerfeller*, 9 Ariz. App. 265, 267, 451 P.2d 623, 625 (1969). We accept the minute

entry recital as reflecting the court's application of the aggravating factors to the criminal damage and burglary counts.

Cruel and Unusual Punishment; Excessive Sentence

¶19 Cobb argues his combined sentences violate the Eighth Amendment prohibition against cruel and unusual punishment and are excessive. The Eighth Amendment "bars the infliction of 'cruel and unusual punishments,'" and the United States Supreme Court "has long recognized that [it] limits permissible sanctions in various contexts." *State v. Berger*, 212 Ariz. 473, ¶¶ 8-9, 134 P.3d 378, 380 (2006), *quoting* U.S. Const. amend. VIII. But, although the Eighth Amendment may prohibit lengthy prison terms in some circumstances, "courts are extremely circumspect" in their review of such terms, applying "a 'narrow proportionality principle' that prohibits sentences that are 'grossly disproportionate' to the crime." *Id*. ¶ 10, *quoting Ewing v. California*, 538 U.S. 11, 20, 23 (2003).

¶20 Cobb contends the combined length of his sentences is disproportionate to the offenses, but, as he concedes, we generally "do[] not consider the sentences in the aggregate, but rather separately in determining" proportionality. *See id*. ¶ 27. "Thus, if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate." *Id*. ¶ 28. Cobb does not argue his

sentences individually violate the Eighth Amendment.[6] We therefore find no Eighth Amendment violation.

¶21 Cobb also claims the maximum sentences were excessive because the trial court did not give sufficient weight to the mitigating factors presented. "Where a sentence is within the permissible statutory limits, it will not be modified or reduced on appeal unless it clearly appears excessive under the circumstances." *State v. Pickard*, 105 Ariz. 219, 221, 462 P.2d 87, 89 (1969); *see also State v. Gillies*, 142 Ariz. 564, 573, 691 P.2d 655, 664 (1984). The court is required only to consider evidence offered in mitigation; it is not required to find the evidence mitigating. *State v. Long*, 207 Ariz. 140, ¶ 41, 83 P.3d 618, 626 (App. 2004). And "[t]he weight to be given any factor asserted in mitigation rests within the trial court's sound discretion." *State v. Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d 355, 357 (App. 2003).

¶22 In this case, Cobb presented his sentencing considerations, and the trial court indicated it had "read and considered all of the factors defense counsel ha[d] brought to [its] attention." And the sentences imposed were within the statutory limits. *See* § 13-703(C), (J). Accordingly, we cannot say the court abused its broad discretion in weighing the aggravating and mitigating circumstances, and Cobb has not demonstrated the sentences were clearly excessive. *See Pickard*, 105 Ariz. at 221, 462 P.2d at 89.

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[6]Although Cobb contends *Berger* was wrongly decided because "the arbitrary imposition of consecutive sentences . . . does result in cruel and unusual punishment," we are bound by the decisions of our supreme court and have no authority to disregard or overrule them. *State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003).

Disposition

¶23 Cobb's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge