FILED BY CLERK
OCT -2 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JERRY FLYNN WALKER, Appellant.	)	2 CA-CR 2012-0423 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100062001

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

John William Lovell — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 Appellant Jerry Walker was convicted after a jury trial of two counts of sale and/or transfer of a narcotic drug, and the trial court sentenced him to concurrent twelve-year prison terms. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting he has reviewed the record thoroughly but found no arguable issue to raise on appeal.

Consistent with *Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d at 97, he has provided "a detailed factual and procedural history of the case with citations to the record" and asks this court to search the record for fundamental error. Walker has filed a supplemental brief asserting the trial court erred in rejecting his motion for a new trial based on the admission into evidence of a photograph of Walker that suggested he had been arrested previously. For the reasons that follow, we vacate the criminal restitution order (CRO) entered at Walker's sentencing but otherwise affirm his convictions and sentences.

¶2 Viewing the evidence in the light most favorable to sustaining the verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), we find sufficient evidence to support the jury's findings of guilt. On two occasions in 2009, Walker sold crack cocaine to an undercover Tucson Police Department officer. A.R.S. §§ 13-3401(5), (20)(z); 13-3408(A)(7). Sufficient evidence also supported the jury's finding that Walker was on pretrial release in another matter when he conducted the drug transactions.

¶3 The undercover officer testified during trial that he had confirmed Walker's identity after the first sale by viewing a photograph associated with Walker's name located in a police department database. That photograph was admitted into evidence and showed Walker dressed in a collared shirt partially covered with what appears to be a smock or drape. Walker's name was printed on the photograph. Walker argues on appeal, as he did in his motion for new trial, that because of the smock and appearance of his name, the jury would conclude the photograph was a jail booking photograph and thus that Walker had been arrested previously. He contends the photograph's admission

into evidence therefore improperly prejudiced him, and the trial court erred in denying his new trial motion.

¶4 We review the trial court's denial of a motion for a new trial under Rule 24.1, Ariz. R. Crim. P., for an abuse of discretion. *State v. Rutledge*, 205 Ariz. 7, ¶ 15, 66 P.3d 50, 53 (2003). Because Walker raised this argument for the first time in his motion for new trial,[1] he has waived all but fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *State v. Davis*, 226 Ariz. 97, ¶ 12, 244 P.3d 101, 104 (App. 2010) (issues raised for first time in motion for new trial not preserved for appellate review). 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.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶5 We agree with Walker that the introduction of a photograph that clearly suggests to the jury that a defendant had previously been arrested can prejudice a defendant and require a new trial. *See State v. Kelly*, 111 Ariz. 181, 189-90, 526 P.2d 720, 728-29 (1974). But that result is not warranted here. First, in his motion for new trial, Walker did not provide the court with any evidence to support his contention that it

[1]At trial, Walker objected to the photograph's admission into evidence, arguing the photograph was taken after his arrest and thus that it could not have been the photograph the officer relied on to identify him.

is common public knowledge that drapes or smocks of the type shown in the photograph are used exclusively in booking photographs, and he does not suggest on appeal that the trial court erred by rejecting his request to take judicial notice of that fact. *See* Ariz. R. Evid. 201(b) (court "may judicially notice a fact that is not subject to reasonable dispute").

¶6 Moreover, even assuming the jury would conclude the drape meant the photograph was a booking photograph, Walker has not demonstrated fundamental error. He has cited no authority, and we find none, determining that the admission of a photograph obliquely suggesting a previous arrest—but not a previous conviction—went "'to the foundation of [his] case,'" took away "'a right essential to his defense,'" and was "'of such magnitude that [he] could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting Hunter*, 142 Ariz. at 90, 688 P.2d at 982; *see also State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 18, 185 P.3d 135, 140 (App. 2008) ("absent any argument or authority that the alleged error here was fundamental, [appellant] cannot sustain his burden in a fundamental error analysis").

¶7 Finally, Walker has not identified resulting prejudice. His primary defenses were misidentification and alibi, but Walker's appearance is distinctive, and the undercover officer unreservedly identified Walker as the man who had obtained drugs for him on both occasions. And the photograph would have done little to undermine Walker's alibi defense, which was based solely on his mother's testimony.

¶8 Walker additionally asserts, for the first time on appeal, that the undercover Tucson police officer committed "perjury," apparently by stating at one point that he had

searched for Walker's photograph in "our databases and systems," and later stating the photograph was from a "Pima County" database. No reasonable view of this testimony would permit us to describe the officer's statements as perjury. Even if we agreed with Walker's unlikely premise that the officer's arguably technically inconsistent statements could constitute a knowing falsehood, it plainly was not material to any issue in the case. *See* A.R.S. § 13-2702(A).

¶9 Substantial evidence supported the trial court's finding that Walker had numerous previous felony convictions. And the sentences imposed did not exceed the legal statutory limit. A.R.S. §§ 13-105(22); 13-701(C), (E); 13-703(C), (J), (K); 13-708(D); 13-3408(B)(7).[2] We note, however, that the court appears to have erred in Walker's favor by imposing only a twelve-year prison term for each offense instead of the minimum permissible 12.5-year mitigated term. § 13-703(J). The state did not cross-appeal on this issue, however, and thus it is not properly before us. *See State v. Kinslow*, 165 Ariz. 503, 507, 799 P.2d 844, 848 (1990) (appellate court "will not correct sentencing errors that benefit a defendant, in the context of his own appeal, absent a proper appeal or cross-appeal by the state").

¶10 The trial court imposed attorney fees and a fine with a surcharge at sentencing, and the sentencing minute entry stated that they were "reduced to a Criminal Restitution Order." But this court has determined that in these circumstances, based on

[2]We refer to the version of the sentencing statute in effect at the time Walker committed his offenses. *See* 2008 Ariz. Sess. Laws, ch. 301, § 10 (§ 13-105), § 23 (§ 13-701), § 28 (§ 13-703), §§ 17, 32 (§ 13-708).

A.R.S. § 13-805(C),[3] "the imposition of a CRO before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009).

¶11 Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and found none except the improper CRO. *See State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) (*Anders* requires court to search record for fundamental error). And we have rejected the arguments raised in Walker's supplemental brief. The CRO entered by the trial court is vacated; Walker's convictions and sentences are otherwise affirmed.

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

CONCURRING:

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

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

[3]Section 13-805 has been modified three times since Walker committed his offenses, but none of those alterations are material here. 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1; 2011 Ariz. Sess. Laws, ch. 99, § 4.