IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

---

THE STATE OF ARIZONA,
*Appellee,*

*v.*

AARON BRICE ARNOLDI,
*Appellant.*

No. 2 CA-CR 2013-0012
Filed November 7, 2013

---

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NOT FOR PUBLICATION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

---

Appeal from the Superior Court in Pima County
No. CR20121377002
The Honorable Paul E. Tang, Judge Pro Tempore

**AFFIRMED IN PART; VACATED IN PART**

---

COUNSEL

Thomas C. Horne, Arizona Attorney General
by Joseph T. Maziarz, Section Chief Counsel, Phoenix
and Amy Pignatella Cain, Assistant Attorney General, Tucson

*Counsel for Appellee*

Lori J. Lefferts, Pima County Public Defender
by David J. Euchner and Sarah A. Bullard, Assistant Public Defenders, Tucson

*Counsel for Appellant*

---

**MEMORANDUM DECISION**

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Kelly and Judge Espinosa concurred.

---

E C K E R S T R O M, Judge.

**¶1** After a jury trial, appellant Aaron Arnoldi was convicted of possession of a dangerous drug, possession of a dangerous drug for sale, and possession of drug paraphernalia, all of which he committed while on release for another felony case. He was sentenced to concurrent, presumptive, enhanced prison terms, the longest of which was 17.75 years. On appeal, he claims the trial court erred in instructing the jury on accomplice liability and in finding he had two historical prior felony convictions. For the following reasons, we vacate the criminal restitution order but otherwise affirm Arnoldi's convictions and sentences.

## Factual and Procedural Background

**¶2** "We view the facts in the light most favorable to sustaining the verdict[s], resolving all reasonable inferences against the defendant." *State v. Almaguer*, 232 Ariz. 190, ¶ 2, 303 P.3d 84, 86 (App. 2013). In April 2012, police conducted surveillance on a house in Tucson on Roger Road. During their surveillance, officers observed Arnoldi in the carport of the home. Another person, D.B., was also in the house at the time.

**¶3** A man named J.A. entered the house, stayed for a brief period, then left. Police stopped him in his car shortly thereafter. J.A. was found to have

methamphetamine and empty clear baggies. Upon questioning, he told the officers he had purchased the drugs from Arnoldi.

**¶4** Police officers then obtained a search warrant for the house based on J.A.'s statements. When they conducted the search, D.B. and Arnoldi were the only people in the house. A witness testified that Arnoldi was residing at the house and had been living there "[o]ff and on for a few years." During the search, officers noted that only one bedroom contained a bed, along with a single "grouping of clothing" that "all seemed to be for an adult male and approximately the same size." In that bedroom, police found methamphetamine, plastic baggies, digital scales, and Alprazolam pills, as well as a bill from Tucson Electric Power with Arnoldi's name on it.

**¶5** Arnoldi was convicted as described above. This timely appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033.

**Accomplice Liability Instruction**

**¶6** At trial, the court gave an instruction on accomplice liability at the state's request and over Arnoldi's objection. Arnoldi claims this instruction was improper because "[t]he facts . . . simply do not support accomplice liability" and "neither counsel argued that Arnoldi was an accomplice." We find no error in the giving of the instruction.

**¶7** "We review the trial court's decision to give or refuse a jury instruction for an abuse of discretion." *State v. Hurley*, 197 Ariz. 400, ¶ 9, 4 P.3d 455, 457 (App. 2000). A jury instruction is appropriate if it is supported by any reasonable interpretation of the evidence. *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998); *State v. Lopez*, 209 Ariz. 58, ¶ 10, 97 P.3d 883, 885 (App. 2004).

**¶8** A person is liable as an accomplice who, with the requisite intent:

> 1. Solicits or commands another person to commit the offense; or

> 2. Aids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense[; or]
>
> 3. Provides means or opportunity to another person to commit the offense.

A.R.S. § 13-301; *accord State v. King*, 226 Ariz. 253, ¶ 16, 245 P.3d 938, 943 (App. 2011). Although a defendant's presence at a crime scene is not sufficient grounds for accomplice liability, *State v. Tison*, 129 Ariz. 546, 554, 633 P.2d 355, 363 (1981), the evidence reasonably supports an inference that Arnoldi was not "merely present."

**¶9** Here, the state argued that if the jury did not believe Arnoldi sold the drugs to J.A., it could nonetheless find him guilty as an accomplice if it believed someone else had sold the drugs because "Arnoldi is providing means or opportunity. He's providing the house. He's providing the means to sell these drugs out of." All the drugs, bags, and scales were found in a room that appeared to be Arnoldi's bedroom. And an officer testified that baggies and scales commonly are used in drug sales. This supports an inference that Arnoldi either provided the house as a place to keep the drugs and conduct drug transactions or that he assisted in the preparation of drugs for sale, even if he was not the primary seller. Either would be sufficient to support a finding of accomplice liability. *See King*, 226 Ariz. 253, ¶ 16, 245 P.3d at 943. Although the court did not state its reasons for giving the instruction, we will affirm a trial court's ruling if it was correct for any reason. *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

**¶10** Furthermore, the trial court also instructed the jury that Arnoldi must be acquitted if it concluded he was merely present at the scene where criminal activity had occurred. This clarified that accomplice liability could not be based solely on the fact that Arnoldi was present at the scene. *See State v. Noriega*, 187 Ariz. 282, 286, 928 P.2d 706, 710 (App. 1996). We therefore find the trial court did not abuse its discretion by instructing the jury on accomplice liability.

## Sentencing

**¶11** Arnoldi argues the trial court improperly concluded, over his objection, that he was a category three offender under A.R.S. § 13-703(C)[1] based on a finding that he had two historical prior felony convictions, rather than a category two offender under § 13-703(B). In general, we review the sentence imposed by a trial court for an abuse of discretion, *State v. Vermuele*, 226 Ariz. 399, ¶ 15, 249 P.3d 1099, 1103 (App. 2011); however, when a claim of sentencing error necessarily involves a matter of statutory interpretation, our review is de novo. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). We find that Arnoldi was properly sentenced.

**¶12** Arnoldi concedes that he has prior felony convictions from 2002, 2003, and 2004. He likewise concedes the 2003 conviction qualifies as a historical prior pursuant to A.R.S. § 13-105(22)(b)[2] because it was a class three felony committed within ten years of the present offense. Arnoldi disputes whether, as the trial court found, the 2003 conviction may be used both as a historical prior in its own right and to establish that the 2004 conviction was a historical prior pursuant to § 13-105(22)(d) because it was "a third or more prior felony conviction."

**¶13** In *State v. Garcia*, 189 Ariz. 510, 511, 943 P.2d 870, 871 (App. 1997), the defendant had prior felony convictions from April 1985, July 1985, and 1992. This court determined that the 1992 conviction, which already had been counted as a historical prior felony conviction because it was a class four felony committed within five years of the present offense, could not also be counted as a "third or more prior felony conviction."[3] *Id.* at 515, 943 P.2d at 875. We likewise

---

[1]We cite the current version of this statute, as it has not changed in relevant part since Arnoldi committed his offenses. *See* 2010 Ariz. Sess. Laws, ch. 194, § 2.

[2]We cite the current version of the statute, as the most recent changes relating to out-of-state convictions do not affect this appeal. *See* 2012 Ariz. Sess. Laws, ch. 190, § 1.

[3]*Garcia* refers to the former A.R.S. § 13-604, 1996 Ariz. Sess. Laws, ch. 123, § 1 and ch. 34, § 1 for the definition of "historical prior felony conviction." *Garcia*, 189 Ariz. 510, 512 n.1, 943 P.2d 870, 872 n.1. This definition was subsequently amended and later moved, in 2009, to § 13-105(22). 2008 Ariz. Sess. Laws, ch. 301, §§ 10, 120. But none of its changes are material to this decision.

determined that the "third" felony had to be the third in chronological time and that the state therefore could not say that either 1985 conviction was the "third." *Id.*; *see also State v. Decenzo*, 199 Ariz. 355, ¶¶ 6-9, 18 P.3d 149, 151-52 (App. 2001) (applying *Garcia*'s interpretation of historical prior felony definition).

**¶14** Arnoldi asserts that *Garcia* stands for the proposition that a felony conviction that already has been counted as a historical prior under another subsection of § 13-105(22) cannot be counted when determining whether a defendant has a third prior felony conviction. But we do not read *Garcia* so broadly. Rather, we determined in *Garcia* that a single conviction cannot be the basis for a finding of two historical priors. 189 Ariz. at 515, 943 P.2d at 875. That case did not hold that an offense already established as a historical prior conviction cannot be used *at all* in counting the number of prior felony convictions. Indeed, had *Garcia* accepted such a premise, it would not have mattered which conviction were labeled the "third," an issue that was at the center of the *Garcia* opinion. *Id.* at 513-15, 943 P.2d at 873-75. In this case, where Arnoldi's 2003 and 2004 convictions were found to be separate historical priors, the trial court did not err in sentencing Arnoldi as a category three offender.

**Criminal Restitution Order**

**¶15** Although Arnoldi has not raised the issue on appeal, we find fundamental error in the sentencing minute entry, which states that "all fines, fees and assessments are reduced to a Criminal Restitution Order [CRO], with no interest, penalties or collection fees to accrue while the defendant is in the Department of Corrections." *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it). We have held "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). This is so even where, as here, the trial court delayed the accrual of interest. Nothing in former A.R.S. § 13-805,[4] which governed the imposition of CROs at the time of Arnoldi's sentencing, "permits a court to delay or alter the accrual of

---

[4]We cite the former version of the statute in effect at the time of Arnoldi's sentencing. 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4. The statute has since been amended and may permit the imposition of a CRO at sentencing in circumstances not present here.

interest when a CRO is 'recorded and enforced as any civil judgment' pursuant to § 13-805(C)." *Lopez*, 231 Ariz. 561, ¶ 5, 298 P.3d at 910.

## Conclusion

**¶16** For the foregoing reasons, although we vacate the CRO, Arnoldi's convictions and sentences are otherwise affirmed.