IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOSH ALAN ALBRITTON,
Appellant.

No. 2 CA-CR 2013-0128
Filed December 19, 2013

Appeal from the Superior Court in Cochise County
No. CR201100236
The Honorable James L. Conlogue, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz, Section Chief Counsel, Phoenix
and Jonathan Bass, Assistant Attorney General, Tucson
Counsel for Appellee

Lynn T. Hamilton, Mesa
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 Following a jury trial, Joshua Albritton was convicted of three counts of aggravated assault and eight counts of misconduct involving weapons. On appeal, Albritton argues that insufficient evidence supported the jury verdicts on the weapons misconduct charges, that his cumulative eighty-year prison sentence for the weapons misconduct charges violates the Eighth Amendment's prohibition against cruel and unusual punishment, and that the prosecutor committed misconduct during closing arguments. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Pena*, 233 Ariz. 112, ¶ 4, 309 P.3d 936, 938 (App. 2013). In March 2011, a lending company sent L.M. to repossess Albritton's motorcycle because he had defaulted on the loan. L.M. arrived at Albritton's former wife's residence sometime between three and four in the morning and found Albritton in the driveway working on a truck. L.M. explained who he was and why he was there, but Albritton did not respond and instead began walking into the garage.

¶3 L.M. followed Albritton and stopped at the entrance of the garage. Albritton closed the garage door, trapping L.M.'s foot and hitting it with a hatchet, almost completely severing one of L.M.'s toes. Albritton then raised the garage door slightly, allowing L.M. to free his foot. L.M. returned to his work truck and called 9-1-1.

¶4 After police arrived, they obtained a warrant to search the house for evidence related to L.M.'s injuries. During the search, police found a hatchet that was consistent with the weapon used to injure L.M. Police also found two safes in the stairwell—a small combination safe and a larger safe that required a key to open. Albritton told the officers the combination to the smaller safe and explained that it contained the key to open the larger safe. The larger safe opened into a space underneath the stairs that reached up to the second story and contained eight firearms and a large amount of ammunition. Because Albritton was a convicted felon whose rights to possess a firearm had not been restored, officers seized the weapons and a portion of the ammunition.

¶5 Albritton was charged with and convicted of three counts of aggravated assault, eight counts of misconduct involving weapons by a prohibited possessor, and one count of refusing to provide his name to a police officer. He was sentenced to concurrent prison terms for the aggravated assault charges, the longest of which was ten years, and consecutive, presumptive ten-year prison terms for the weapons misconduct charges, totaling eighty years, to begin after the sentences for the aggravated assaults. We have jurisdiction over Albritton's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Sufficiency of the Evidence

¶6 Albritton first argues the trial court erred in denying his motion for a judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P., because insufficient evidence supported the jury's verdicts for misconduct with weapons. He claims the state did not establish he had either dominion or control over the weapons.

¶7 We review de novo whether sufficient evidence was presented at trial to support a conviction. *State v. Mwandishi*, 229 Ariz. 570, ¶ 6, 278 P.3d 912, 913 (App. 2012). "'[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990),

quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis omitted).

¶8 As relevant here, a person commits misconduct involving weapons by knowingly "[p]ossessing a deadly weapon . . . if such person is a prohibited possessor."[1] A.R.S. § 13-3102(A)(4). Possession may be actual or constructive. § 13-105(34); *State v. Gonsalves*, 231 Ariz. 521, ¶ 9, 297 P.3d 927, 929 (App. 2013). Constructive possession exists when the defendant has either dominion or control over the contraband itself, or the place where the weapons are found. *See State v. Teagle*, 217 Ariz. 17, ¶ 41, 170 P.3d 266, 276 (App. 2007). The circumstances must be such that a jury can reasonably infer that the defendant had knowledge of the contraband's presence. *State v. Villavicencio*, 108 Ariz. 518, 520, 502 P.2d 1337, 1339 (1972). The state may prove constructive possession through direct or circumstantial evidence. *Gonsalves*, 231 Ariz. 521, ¶ 10, 297 P.3d at 929. Additionally, under a theory of constructive possession, exclusive control over the contraband is not necessary. *Villavicencio*, 108 Ariz. at 520, 502 P.2d at 1339. But mere potential access to someone else's property is insufficient to prove constructive possession. *State v. Cox*, 214 Ariz. 518, ¶ 15, 155 P.3d 357, 360 (App. 2007).

¶9 In cases upholding convictions based on constructive possession, we have found that a jury may properly infer a defendant's knowledge of the contraband's presence based on his or her access or proximity to the location where the contraband was found, particularly when a large amount of contraband is present. For example, "[a] jury may properly infer that a driver and sole occupant of a vehicle containing a large amount of drugs was aware that the drugs were in the vehicle." *Teagle*, 217 Ariz. 17, ¶¶ 41, 44, 170 P.3d at 276-77. Similarly, a defendant's presence in a vehicle that contained a large amount of drugs and was parked in front of the defendant's sister's house gave rise to the inference that the defendant knew the drugs were in the car. *State v. Lopez*, 21 Ariz. App. 408, 409-10, 555 P.2d 667, 668-69 (1976).

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[1] Albritton does not dispute his status as a "prohibited possessor." *See* A.R.S. § 13-3101(A)(7)(b).

¶10 Here, Albritton was the only person who knew the combination to the smaller safe and that it contained the key to open the larger safe. His former spouse testified she did not know the combination to the smaller safe and also did not know the contents of either safe. Once inside the combination safe, the officers also found the registration for Albritton's motorcycle.

¶11 Additionally, the order of repossession for his motorcycle listed his home address as that of his former wife. Albritton was keeping his motorcycle at the house the morning L.M. arrived, and his former wife testified that Albritton could keep his vehicles at the house. She also testified that Albritton visited the house several times a year. Thus, a jury reasonably could infer that Albritton had frequent access to the safes. And although Albritton's former spouse testified that a friend who was in China also was storing his belongings in the safe, the state was not required to prove Albritton had exclusive control over the weapons to support the convictions. *See Cox,* 214 Ariz. 518, ¶ 15, 155 P.3d at 360.

¶12 Albritton asserts the evidence adduced at trial only established that he had mere access to the safe or, alternatively, mere knowledge of the existence of weapons in the house. But a jury reasonably could infer that Albritton's seemingly exclusive knowledge of how to open the safes, and his ability to frequently access the safes, showed a level of control beyond that of mere access. Moreover, the jury could infer the sheer volume of weapons and ammunition belied any claim that he had access to the safes without knowledge of those items. Viewing these facts in the light most favorable to the prosecution, the state produced sufficient evidence at trial from which the jury could conclude that Albritton had dominion or control over the safes, and could reasonably infer that Albritton knew the weapons were in the large safe. *See Villavicencio*, 108 Ariz. at 520, 502 P.2d at 1339; *see also Teagle*, 217 Ariz. 17, ¶ 44, 170 P.3d at 277; *Lopez*, 27 Ariz. App. at 409-10, 555 P.2d at 668-69.

¶13 Albritton also argues the state failed to produce any fingerprint or deoxyribonucleic (DNA) evidence related to the safe and weapons. But circumstantial evidence is sufficient to support constructive possession so long as it shows "'specific facts or

circumstances that the defendant exercised dominion or control' over the object." *Gonsalves*, 231 Ariz. 521, ¶ 10, 297 P.3d at 929, *quoting State v. Villalobos Alvarez*, 155 Ariz. 244, 245, 745 P.2d 991, 992 (App. 1987). Moreover, while Albritton "would be free to argue that if his prints were not on the [safe] he had never touched it, a finder of fact would be under no compulsion to accept that conclusion." *State v. Torres*, 162 Ariz. 70, 75-76, 781 P.2d 47, 52-53 (App. 1989); *see also State v. Engram*, 171 Ariz. 363, 367, 831 P.2d 362, 366 (App. 1991) (failure to preserve fingerprint evidence not denial of due process where other evidence supports conviction).

¶14 Albritton further asserts the state did not demonstrate that he lived at the house. But residence at the location of the contraband is not a required element of constructive possession. *See Teagle*, 217 Ariz. 17, ¶ 41, 170 P.3d at 276. To show constructive possession, the state need only prove that the defendant has either dominion or control over the contraband, or the place where the contraband is found. *Id.* And the evidence showed that Albritton visited the house, listed it as his address with the lending company as evidenced on the order of repossession, and was seemingly the only person who knew how to access the safes. A jury could therefore reasonably infer that Albritton constructively possessed the weapons even if he did not live at the house.

¶15 Accordingly, because sufficient evidence supported the jury's guilty verdicts, the court did not err in denying Albritton's Rule 20 motion. *See Mwandishi*, 229 Ariz. 570, ¶ 11, 278 P.3d at 914.

Proportionality of the Sentence

¶16 Albritton next argues his cumulative sentences for the weapons misconduct charges were grossly disproportionate to the gravity of his offenses and therefore violated his Eighth Amendment right to be free from cruel and unusual punishment. He does not challenge Arizona's sentencing system but only his particular sentence. He also contends that the judge's decision to make his eight sentences for weapons misconduct consecutive, rather than concurrent, was "an inappropriate emotional reaction by the Judge."

¶17 Albritton did not raise this argument in the trial court during sentencing, and we therefore review only for fundamental, prejudicial error. *See State v. Kasic*, 228 Ariz. 228, ¶ 15, 265 P.3d 410, 413 (App. 2011). Under this standard of review, the defendant has the burden to show both that the error was fundamental and that it caused him prejudice. *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005). However, the imposition of an illegal sentence constitutes fundamental, prejudicial error. *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002). Moreover, we review constitutional issues de novo. *State v. Dann*, 220 Ariz. 351, ¶ 27, 207 P.3d 604, 613 (2009).

¶18 The Eighth Amendment of the United States Constitution bars the infliction of "cruel and unusual punishment." U.S. Const. amend. VIII.[2] The Eighth Amendment has been applied to lengthy prison sentences, but "courts are extremely circumspect in their Eighth Amendment review of prison terms." *State v. Berger*, 212 Ariz. 473, ¶ 10, 134 P.3d 378, 380 (2006). A prison sentence violates the Eighth Amendment only if it is "'so severe as to shock the conscience of society.'" *State v. Davis*, 206 Ariz. 377, 388, 79 P.3d 64, 75 (2003), *quoting State v. Davis*, 108 Ariz. 335, 337, 498 P.2d 202, 204 (1972). Successful challenges to the proportionality of a sentence are, consequently, "exceedingly rare." *State v. Long*, 207 Ariz. 140, ¶ 22, 83 P.3d 618, 623 (App. 2004).

¶19 "[N]oncapital sentences are subject only to a 'narrow proportionality principle' that prohibits sentences that are 'grossly disproportionate' to the crime." *Berger*, 212 Ariz. 473, ¶ 10, 134 P.3d at 380, *quoting Ewing v. California*, 538 U.S. 11, 20, 23 (2003) (O'Connor, J., concurring in the judgment). A two-part test determines whether a noncapital sentence is "grossly disproportionate." *Id.* ¶ 12. The court must assess: (1) whether a comparison of the gravity of the offense and the harshness of the

[2]Article II, § 15 of the Arizona Constitution is nearly identical, and our supreme court has declined to interpret Arizona's prohibition against cruel and unusual punishment to provide protection greater than does the Eighth Amendment. *See State v. Davis*, 206 Ariz. 377, ¶ 12, 79 P.3d 64, 67-68 (2003).

penalty leads to an inference of gross disproportionality; and, if so, (2) whether a comparison of the sentence for the crime at issue with the sentences for other crimes in this state and the sentences for the same crime in other states support the inference of disproportionality. *Id.* Only if the first factor is met will we consider the second. *Id.* ¶ 16.

¶20 We evaluate the first part of the test "by comparing 'the gravity of the offense [and] the harshness of the penalty.'" *Id.* ¶ 12, *quoting Ewing*, 538 U.S. at 28. This comparison "must accord substantial deference to the legislature and its policy judgments as reflected in statutorily mandated sentences." *Id*. ¶ 13.

¶21 Additionally, the imposition of consecutive sentences is not considered in a proportionality analysis because "[a] defendant has no constitutional right to concurrent sentences for two separate crimes involving separate acts." *State v. Jonas*, 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990). Rather, we focus only "'on [whether] the sentence imposed for each specific crime, not the cumulative sentence'" gives rise to an inference of gross disproportionality. *Kasic*, 228 Ariz. 228, ¶ 24, 265 P.3d at 415, *quoting United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988). "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." *Berger*, 212 Ariz. 473, ¶ 28, 134 P.3d at 384.

¶22 Here, Albritton was convicted of eight counts of misconduct with weapons. Each count involved a different weapon and is therefore considered a "separate crime[] involving a separate act[]." *See Jonas*, 164 Ariz. at 249, 792 P.2d at 712; § 13-3102(A)(4). The judge sentenced Albritton, as a category three repeat offender, to the presumptive ten-year sentence on each count and ordered they be served consecutively after considering both mitigating and aggravating factors. *See* A.R.S. §§ 13-3102(A)(4), (L); 13-703(C), (J)

¶23 Albritton does not argue that his individual sentences, viewed separately, constitute cruel and unusual punishment. He only argues that the cumulative sentences totaling eighty years are grossly disproportionate to the gravity of the offenses. But, as stated

above, we do not consider consecutive sentences in a proportionality analysis. *See Berger*, 212 Ariz. 473, ¶ 27, 134 P.3d at 384. Consequently, Albritton has not made the threshold showing of an inference of gross disproportionality between the gravity of his offense and the presumptive sentence imposed on each of his eight convictions. Thus, we need not conduct an analysis comparing Albritton's sentences with those for other crimes in Arizona or with sentences for the same crime across the nation. *See Berger*, 212 Ariz. 473, ¶¶ 12-13, 16, 134 P.3d at 381, 382. Nor has Albritton shown that the sentences were an emotional reaction by the judge to his difficult behavior. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607 (2005) (burden on defendant to show fundamental error). To the contrary, the judge apparently considered his difficult behavior a mitigating factor. We therefore affirm Albritton's sentences.

Prosecutorial Misconduct

¶24 Albritton lastly argues he should be granted a new trial because several comments made by the prosecutor during his closing argument constituted prosecutorial misconduct and denied Albritton a fair trial. However, Albritton did not object at the trial court on grounds of prosecutorial misconduct, nor did he move for a mistrial either during or following the trial. He has therefore forfeited the right to relief for all but fundamental, prejudicial error. *See State v. Rutledge*, 205 Ariz. 7, ¶ 30, 66 P.3d 50, 56 (2003) (objection on different ground in trial court "did not preserve the issue of prosecutorial misconduct" on appeal); *Henderson*, 210 Ariz. 561, ¶¶ 19–20, 115 P.3d at 607-08.

¶25 To show fundamental error, the defendant must first prove that misconduct actually occurred. *State v. Edmisten*, 220 Ariz. 517, ¶ 23, 207 P.3d 770, 777 (App. 2009). If misconduct did occur, the defendant must then show "'that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.*, *quoting State v. Harrod*, 218 Ariz. 268, ¶ 35, 183 P.3d 519, 529 (2008). Additionally, under fundamental error review, prejudice is not presumed, and the defendant bears the burden of establishing not only that an error occurred and that the error was fundamental, but also that the error caused him prejudice. *State v. Valverde*, 220 Ariz. 582, ¶ 12, 208 P.3d 233, 236 (2009).

¶26 Albritton argues the prosecutor committed three acts of misconduct during his closing argument. Albritton first contends the prosecutor improperly appealed to the "passions and fears of the jury" when he asked the jury, "Do you want to have a little Girl Scout going up to this house to sell cookies with a man of this . . . bent of mind?"

¶27 A prosecutor "cannot make arguments that appeal to the fears or passions of the jury." *State v. Morris*, 215 Ariz. 324, ¶ 58, 160 P.3d 203, 216 (2007). The prosecutor in this case improperly preyed on the jurors' fears in this manner, particularly when there are no factual similarities between a repossessor appearing at four in the morning and Girl Scouts selling cookies door-to-door.

¶28 Although we do not condone the improper comment made here, Albritton has failed to show how this isolated comment prejudiced him in any way. He instead rests on the bare assertion that the prosecutor's comment was "outrageous and improper." But after the prosecutor's remarks, the trial judge cautioned the jury that "[w]hat the attorneys say is not evidence." Additionally, the jury was instructed not to be "influenced by sympathy or prejudice," and we presume jurors follow the court's instructions. *See State v. Nelson*, 229 Ariz. 180, ¶ 45, 273 P.3d 632, 642 (2012). Accordingly, Albritton has not met his burden of demonstrating that this isolated improper comment "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Edmisten*, 220 Ariz. 517, ¶ 23, 207 P.3d at 777, *quoting Harrod*, 218 Ariz. 268, ¶ 35, 183 P.3d at 529. We thus reject his argument that this particular instance of misconduct requires reversal.

¶29 He next argues the prosecutor improperly noted that Albritton chose to enter into a security agreement with the lending company and understood the consequences if he defaulted on the loan. Because no security agreement between Albritton and the lending company was admitted into evidence, he contends this reference necessarily brought to the jurors' attention evidence which they were not allowed to consider.

¶30 Prosecutors may "argue all reasonable inferences from the evidence," but cannot "make insinuations that are not supported

by the evidence." *State v. Hughes*, 193 Ariz. 72, ¶ 59, 969 P.2d 1184, 1197 (1998). Here, L.M. testified that he was a "reposessor" who was sent to "obtain the vehicle from Mr. Albritton and deliver it back to the bank, since it was in default." The order of repossession issued for Albritton's motorcycle was also admitted into evidence. Moreover, Albritton requested, and was granted, a jury instruction stating that "[a]fter default, a secured creditor may take possession of collateral pursuant to judicial process or without judicial process, if it proceeds without breach of the peace." A creditor only becomes "secured" pursuant to a security agreement. A.R.S. § 47-9102(A)(71)(a) (defining "secured party").

¶31 Thus, although the actual security agreement was not admitted into evidence, the victim's testimony, the order of repossession, and Albritton's secured-creditor jury instruction all support the inference that a security agreement existed and formed the basis for Albritton's relationship with the lending company. We find no misconduct on the prosecutor's part and therefore no error occurred, fundamental or otherwise. *See Edmisten*, 220 Ariz. 517, ¶ 23, 207 P.3d at 777.

¶32 Lastly, Albritton argues the prosecutor improperly shifted the burden of proof onto Albritton when, during his explanation of joint possession, he stated, "And if he could [have] produced another person, or two or more people or three more . . . [.]" Albritton objected at that point, and the judge instructed the jury that the comments were "only in terms of joint possession and nothing else." The prosecutor went on to state that "[i]f others also had access to [the safe] . . . it wouldn't make [Albritton] innocent. It wouldn't make him not guilty. It would just make him somebody who had joint possession of those weapons . . . ."

¶33 The prosecutor did not commit misconduct in making these comments. As discussed above, constructive possession need not be exclusive and can be shared by two or more persons. *See Villavicencio*, 108 Ariz. at 520, 502 P.2d at 1339. The prosecutor's follow-up remarks to the allegedly improper comment clarified that even had Albritton produced more people with access to the safe, it would not defeat the state's constructive possession theory. The

prosecutor was thus not arguing that Albritton should have or was required to produce any evidence, merely that even if he had done so, it would not have helped him under the state's theory. Moreover, the judge instructed the jury that the comments were only in reference to joint possession, and we presume jurors follow the instructions. *See Nelson*, 229 Ariz. 180, ¶ 45, 273 P.3d at 642. Accordingly, no error occurred. *See Edmisten*, 220 Ariz. 517, ¶ 23, 207 P.3d at 777.

¶34 Albritton additionally argues the trial court erred in failing sua sponte to grant a mistrial based on the alleged prosecutorial misconduct. However, because Albritton has failed to show any prejudice related to the improper Girl Scouts comment, we cannot find the misconduct so permeated the trial with unfairness as to require reversal. *See Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191. We therefore conclude the trial court did not abuse its discretion by failing to order sua sponte a mistrial. *See State v. Ellison*, 213 Ariz. 116, ¶ 61, 140 P.3d 899, 916 (2006) (trial court does not err by failing to order mistrial sua sponte absent fundamental error); *see also State v. Laird*, 186 Ariz. 203, 207, 920 P.2d 769, 773 (1996) ("Sua sponte mistrials can raise double jeopardy issues. If a party wants a mistrial, it ordinarily must ask for one.") (citation and emphasis omitted). [3]

[3] Albritton also appears to argue the trial judge erroneously instructed the jury that "[i]f . . . you think there is a real possibility that the defendant is not guilty, you must give him the benefit of the doubt and find him not guilty." However, Albritton failed to object to this instruction at the trial court, and therefore has forfeited review for all but fundamental error. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. But because Albritton has failed to argue the alleged error was fundamental, he has waived review of this issue. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). Moreover, the language used by the trial court is specifically required by our supreme court. *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995).

Restitution

¶35 Although Albritton did not raise the issue in his brief, the state mentions that the trial court erred in granting a criminal restitution order ("CRO") and asks this court to vacate the order. *See State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013). However, the trial court did not enter a CRO pursuant to § 13-805 and therefore *Lopez* does not apply. Rather, the court ordered only that "restitution shall be paid while incarcerated in an amount to be determined by the Arizona Department of Corrections."

¶36 On the record before us, it appears the court never entered a final restitution order pursuant to § 13-804(H). Should the court ultimately enter such an order, Albritton may separately appeal pursuant to § 13-4033(A)(3). *See Hoffman v. Chandler*, 231 Ariz. 362, ¶¶ 7, 16, 295 P.3d 939, 941, 942 (2013). Because he does not raise the issue on this appeal, we will not address it.

Disposition

¶37 For the foregoing reasons, Albritton's convictions and sentences are affirmed.