IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SHANE MICHAEL LAKE,
Appellant.

No. 2 CA-CR 2014-0447
Filed November 2, 2015

Appeal from the Superior Court in Pima County
No. CR20121147001
The Honorable Christopher Browning, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Barton & Storts, P.C., Tucson
By Brick P. Storts, III
Counsel for Appellant

MEMORANDUM DECISION

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

E C K E R ST R O M, Chief Judge:

¶1 After a jury trial, Shane Lake was convicted of dangerous or deadly assault by a prisoner. A.R.S. § 13-1206. The trial court sentenced him to an enhanced, maximum prison term of twenty-eight years. A.R.S. § 13-703(C), (J). The court found as aggravating factors Lake's two prior felony convictions, as well as "[t]he emotional impact on the victim" and the "infliction of severe and gratuitous violence upon [the victim]." On appeal, Lake argues the court erred in considering the latter aggravating factors because they were not found by the jury, in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and "[s]tate law."[1] Finding no error, we affirm.

¶2 We review for an abuse of discretion a trial court's imposition of a sentence within the appropriate range. *State v. Ward*, 200 Ariz. 387, ¶ 5, 26 P.3d 1158, 1160 (App. 2001). But we review de novo "[w]hether a trial court may employ a given factor to aggravate a sentence." *State v. Alvarez*, 205 Ariz. 110, ¶ 6, 67 P.3d

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[1]The state argues we must review for only fundamental, prejudicial error because Lake did not raise this argument below. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). We disagree; Lake argued the trial court could not impose a prison term greater than the presumptive absent a jury finding of an aggravating factor and could not consider emotional harm to the victim as an aggravating factor because it had not been found by a jury. Although this is not the precise argument Lake raises on appeal, it is sufficient to preserve the issue.

706, 709 (App. 2003). In *Apprendi*, the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Consistent with *Apprendi*, a trial court is permitted to impose a prison term greater than the presumptive only if the trier of fact finds at least one aggravating factor specifically enumerated in § 13-701(D) or the court finds "[t]he defendant was previously convicted of a felony within the ten years immediately preceding the date of the offense" pursuant to § 13-701(D)(11). *See State v. Schmidt*, 220 Ariz. 563, ¶¶ 6-7, 208 P.3d 214, 216-17 (2009); *see also* § 13-703(D). Aggravating factors falling within the so-called "catch-all" provision in § 13-701(D)(25), however, cannot alone permit a trial court to impose an aggravated sentence—at least one enumerated aggravating factor must be found in compliance with *Apprendi*. *See Schmidt*, 220 Ariz. 563, ¶¶ 9-11, 208 P.3d at 217.

¶3 As Lake acknowledges, a trial court is entitled to find the fact of a prior conviction and, here, the prior convictions found by the court permit the imposition of the maximum prison term even with no other aggravating factors. *See State v. Bonfiglio*, 231 Ariz. 371, ¶¶ 8-11, 295 P.3d 948, 950-51 (2013). Lake argues, however, that the court nonetheless erred in imposing the maximum prison term because it considered additional aggravating factors not found by the jury. Citing *Schmidt*, he contends that, although a court is entitled to find additional aggravating factors upon finding prior convictions, it is limited to only "non-statutory aggravating factors" falling within the catch-all provision found in § 13-701(D)(25). Thus, Lake concludes, because emotional harm to the victim is an enumerated aggravating factor, the court was not authorized to consider it.

¶4 Lake's argument fails. Our supreme court stated in *State v. Price* that, "[o]nce [an aggravating] factor is properly found—by the jury, based on a defendant's admission, or, for a prior conviction, by the court or the jury—'the Sixth Amendment permits the sentencing judge to find and consider additional factors relevant to the imposition of a sentence up to the maximum prescribed in

that statute.'" 217 Ariz. 182, ¶ 15, 171 P.3d 1223, 1226 (2007), *quoting State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005); *see also* § 13-701(F). Nothing in *Price* or *Martinez* limits the sentencing court's fact-finding authority to only those factors falling within the catch-all provision.

¶5 We recognize that, in *Schmidt*, our supreme court stated, "[w]hen one or more clearly enumerated aggravators are found consistent with *Apprendi*, and they allow imposition of an aggravated sentence under the relevant statutory scheme," a sentencing court could then properly rely "on other factors embraced by a catch-all provision to justify a sentence up to the statutory maximum." 220 Ariz. 563, ¶ 11, 208 P.3d at 217. But this language in *Schmidt* does not narrow the scope of the sentencing court's authority. It merely reflects the issue before the court in that case—whether the finding of an aggravating factor under the catch-all provision, standing alone, could justify a sentence greater than the presumptive. *Id.* ¶¶ 9-11. Whether a sentencing court could properly find the existence of enumerated factors once sufficient *Apprendi*-compliant factors were established was not before the court. And Lake has identified no basis to limit a court's authority to do so.

¶6 We affirm Lake's conviction and sentence.