IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RAUL GUERRERO,
Appellant.

No. 2 CA-CR 2014-0409
Filed February 16, 2016

Appeal from the Superior Court in Cochise County
No. S0200CR201400020
The Honorable Wallace R. Hoggatt, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Kathryn A. Damstra, Assistant Attorney General, Tucson
Counsel for Appellee

John William Lovell, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

S T A R I N G, Judge:

¶1 After a jury trial, appellant Raul Guerrero was convicted of aggravated robbery and unlawful use of a means of transportation. The trial court sentenced him to concurrent prison terms, the longest of which was a partially aggravated 7.5-year term for aggravated robbery. Guerrero argues the court erred in rejecting proposed mitigating factors "based solely on the fact that these factors were not connected to the offenses." He also contends insufficient evidence supported the jury's determination that the victim of aggravated robbery had "suffered substantial emotional harm" and the court thus erred in "according substantial weight" to that fact in imposing an aggravated sentence. We conclude there was no error and therefore affirm.

¶2 Guerrero failed to raise the above issues at trial, and both he and the state assert this court should review his claims for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) ("defendant who fails to object at trial forfeits the right to obtain appellate relief" unless defendant shows fundamental, prejudicial error).[1] There is no question Guerrero failed to raise the insufficiency of evidence issue at trial, despite

[1]"Reviewing courts consider alleged trial error under the harmless error standard when a defendant objects at trial and thereby preserves an issue for appeal. . . . Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d at 607.

having ample opportunity to do so. Arguably, however, the trial court's having rejected his proposed mitigating factors could be subject to this court's analysis in *State v. Vermuele*, 226 Ariz. 399, ¶ 6, 249 P.3d 1099, 1101 (App. 2011) (defendant did not waive ordinary appellate review by failing to object during or following imposition of sentence). However, because we find no error, fundamental or otherwise, this case does not require us to decide whether Guerrero forfeited his rights as contemplated in *Henderson* or whether *Vermuele* applies.[2]

¶3 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Fontes*, 195 Ariz. 229, ¶ 2, 986 P.2d 897, 898 (App. 1998). In January 2014, Guerrero and his codefendant, Jasmine Lof, approached S.G. in a parked car as he waited for his mother. He declined to give them a ride, and Lof then demanded that S.G. give her the keys. When S.G refused, Lof told Guerrero to "get the gun" and Guerrero, whose hands were in his pockets, told S.G. to get out of the car. He did so, and Guerrero and Lof took the car. S.G. testified he got out of the car because he was afraid of getting shot. In addition to finding Guerrero guilty of aggravated robbery and unlawful use of a means of transportation, the jury found as an aggravating factor "physical, emotional, or financial harm" to S.G.[3]

¶4 During a mitigation hearing, Guerrero's mother testified that, seven or eight years earlier, Guerrero had been diagnosed with a sleeping disorder, bipolar disorder, and anxiety

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[2]Here, after imposing the sentence, the court asked: "Is there anything further on this matter at this time?" Because we do not find error of any sort, we need not decide whether this amounted to a "clear procedural opportunity to challenge the rendition of sentence before it became final." *Vermuele*, 226 Ariz. 399, ¶ 9, 249 P.3d at 1102.

[3]The jury also found Guerrero guilty of armed robbery, but the trial court vacated that conviction as "contrary to the weight of the evidence." In addition, the jury found S.G.'s mother, the owner of the car, had suffered "physical, emotional, or financial harm."

but that he had responded well to medication and was "acting more stable" at the time of his offenses. The trial court found no mitigating factors, noting Guerrero's mental health history did not "relate" to his offenses and there was "no real connection" present.

¶5 Guerrero asserts the trial court erred by rejecting his medical history as a mitigating factor on the basis that it had no nexus to his offenses. To the extent Guerrero presents a question of law, our review is de novo. *See State v. Carrasco*, 203 Ariz. 44, ¶ 5, 49 P.3d 1140, 1141 (App. 2002). In general, however, "[a] trial court has broad discretion to determine the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within statutory limits . . . unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). The weight to be given any mitigating evidence "rests within the trial court's sound discretion" and the court "is not required to find that mitigating circumstances exist merely because mitigating evidence is presented; the court is only required to give the evidence due consideration." *Id.* ¶ 8.

¶6 Guerrero is correct that a trial court is not required to find a nexus to the offense before it may consider evidence as potentially mitigating; however, "the 'lack of a causal nexus between a difficult personal life and the [crime] lessens the effect of this mitigation.'" *State v. Armstrong*, 218 Ariz. 451, ¶ 74, 189 P.3d 378, 392 (2008), *quoting State v. Boggs*, 218 Ariz. 325, ¶ 94, 185 P.3d 111, 130 (2008). A defendant's mental health history is a potentially mitigating factor, "[a]bsent a causal nexus to the crime, however, we usually give it little weight." *State v. Prince*, 226 Ariz. 516, ¶ 113, 250 P.3d 1145, 1171 (2011).

¶7 We do not interpret the trial court's comments as expressing a belief that it was precluded as a matter of law from considering Guerrero's mental health history as a mitigating factor. No such argument was made by the state, and we have found no Arizona authority that would support that conclusion. Trial courts are presumed to know and follow the law. *State v. Williams*, 220 Ariz. 331, ¶ 9, 206 P.3d 780, 783 (App. 2008). The court properly considered the nexus between Guerrero's mental health history and

his crimes in evaluating what weight, if any, to give that history in mitigation. And that mental health history clearly warranted little to no weight in mitigation—Guerrero had been diagnosed years before, his symptoms apparently had been resolved by treatment, and his history had no apparent connection to his crimes. Thus, we see no error in the court's decision not to find Guerrero's mental health history a mitigating factor.

¶8 Guerrero next asserts that insufficient evidence supported the jury's determination that he had caused emotional harm to S.G. and, thus, the trial court erred in aggravating his sentence based on that factor.[4] Guerrero first contends, as we understand his argument, that any emotional harm was insufficient to justify aggravation of his sentence because "[e]motional harm is almost always, if not always, present to some degree in cases involving robbery." He cites no authority, however, for the proposition that a jury may not find an offense caused emotional harm unless the harm caused exceeded the emotional harm that commonly would result from the offense. Indeed, Guerrero's position is contrary to law allowing reliance on an aggravating factor, including emotional harm, that is also an element of an offense if the factor is among those specifically enumerated in A.R.S. § 13-701(D). *See State v. Tschilar*, 200 Ariz. 427, ¶ 33, 27 P.3d 331, 339 (App. 2001). In any event, even were such a requirement to exist, it clearly is met here. Lof strongly indicated Guerrero had been armed, telling him to "get the gun," and S.G. specifically testified

[4]As noted above, we agree with Guerrero and the state that our review of this issue is limited to fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. A verdict unsupported by sufficient evidence constitutes fundamental error. *State v. Stroud*, 209 Ariz. 410, n.2, 103 P.3d 912, 914 n.2 (2005). However, even if Guerrero could establish the evidence was insufficient to support the jury's finding that he caused emotional harm to S.G., we would remand only if he showed the trial court likely would have reached a different result had it not considered an improper aggravating factor. *See Henderson*, 210 Ariz. 561, ¶¶ 26-27, 115 P.3d at 608-09.

that conduct had caused him to fear being shot, a completely understandable response under the circumstances. The presence of a weapon and the threat of serious injury are not inherent in the crime of aggravated robbery. *See* A.R.S. §§ 13-1902(A), 13-1903(A). Here, the jury could easily find S.G.'s fear constituted emotional harm. *See State v. Coulter*, 236 Ariz. 270, ¶ 7, 339 P.3d 653, 657 (App. 2014) (defining emotional harm to include fear).

¶9 We reject Guerrero's additional contention that he is somehow insulated from the jury's finding because it was Lof, and not him, who indicated Guerrero was armed. Even if we agreed Guerrero played no role in suggesting he was armed, a defendant is held accountable for the conduct of his or her accomplice. *See* A.R.S. § 13-303(A)(3). Thus, we find no error in the jury's finding that S.G. suffered emotional harm or the court's reliance on that factor in aggravating Guerrero's sentence for aggravated robbery.

¶10 We affirm Guerrero's convictions and sentences.