

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RICHARD MENDOZA JR.,
Appellant.

No. 2 CA-CR 2015-0115
Filed April 7, 2016

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20124401001
The Honorable Jane L. Eikleberry, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

COUNSEL

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STATE v. MENDOZA
Decision of the Court

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MEMORANDUM DECISION

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

H O W A R D, Presiding Judge:

¶1 Richard Mendoza Jr. was convicted after a jury trial of two counts of first-degree burglary and six counts of prohibited possession. The trial court sentenced him to concurrent and consecutive prison terms totaling 29.75 years. He argues on appeal that his consecutive sentences were improper. We vacate his sentences and remand the case for resentencing.

¶2 We view the facts in the light most favorable to affirming the jury's verdicts. *State v. Ortiz*, 238 Ariz. 329, ¶ 2, 360 P.3d 125, 129 (App. 2015). In November 2012, Mendoza entered a residence and took three firearms. A police officer responding to the residence's alarm saw Mendoza outside the residence, and Mendoza fled without the guns. The officer returned the firearms to the house and locked it. After the officer left, Mendoza entered the house, again triggering an alarm, and left with the same firearms. Mendoza abandoned the firearms before fleeing from arriving officers.

¶3 The trial court sentenced Mendoza to concurrent, 17.75-year prison terms for first-degree burglary and to twelve-year prison terms for each count of prohibited possession. The court ordered those prison terms to run concurrently with each other but consecutive to the terms imposed for the burglaries. On appeal, Mendoza argues the consecutive sentences violate A.R.S. § 13-116 because his conduct constitutes a single act. Mendoza did not raise this issue below. But, in any event, he is correct that any error was fundamental. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115

STATE v. MENDOZA
Decision of the Court

P.3d 601, 607 (2005) (failure to raise claim below forfeits all but fundamental, prejudicial error); *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002) (illegal sentence is fundamental error). We review de novo whether consecutive sentences are proper under § 13-116. *State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006).

¶4 “Under § 13-116, a trial court may not impose consecutive sentences for the same act.” *Id.* To determine whether the defendant’s conduct constitutes a single act:

First, we must decide which of the two crimes is the “ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges.” Then, we “subtract[] from the factual transaction the evidence necessary to convict on the ultimate charge.” If the remaining evidence satisfies the elements of the secondary crime, the crimes may constitute multiple acts and consecutive sentences would be permissible. We also consider whether “it was factually impossible to commit the ultimate crime without also committing the secondary crime.” Finally, we consider whether the defendant’s conduct in committing the lesser crime “caused the victim to suffer a risk of harm different from or additional to that inherent in the ultimate crime.”

Id. ¶ 7, quoting *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989) (alterations in *Urquidez*) (internal citations omitted).

¶5 We agree with the state that two of the sentences for prohibited possession cannot properly be consecutive to the sentences imposed for burglary. To convict Mendoza of first-degree burglary, the state was required to show that he “enter[ed] or remain[ed] unlawfully in or on a residential structure with the intent

STATE v. MENDOZA
Decision of the Court

to commit any theft or felony therein” while “knowingly possess[ing] . . . a deadly weapon or dangerous instrument in the course of committing any theft or felony.” A.R.S. §§ 13-1507(A), 13-1508(A). To convict Mendoza of prohibited possession of a firearm, the state was required to show that he was a prohibited possessor as defined by A.R.S. § 13-3101(A)(7) and that he knowingly “possess[ed] a deadly weapon or prohibited weapon.” A.R.S. § 13-3102(A)(4).

¶6 First-degree burglary is the ultimate charge in these circumstances. *See* § 13-1508(B); § 13-3102(M); *Urquidez*, 213 Ariz. 50, ¶ 7, 138 P.3d at 1179 (most serious charge typically ultimate charge). If we subtract the facts underlying each first-degree burglary, which includes possession of a deadly weapon, insufficient evidence supports one corresponding count of prohibited possession – that is, one for each burglary. Moreover, factually, Mendoza could not have committed either first-degree burglary without having committed one count of prohibited possession of a firearm in connection with each burglary. Thus, first-degree burglary and one count of prohibited possession constitute a single act pursuant to § 13-116 and consecutive sentences are not permitted.¹ *Cf. State v. Carreon*, 210 Ariz. 54, ¶¶ 107-09, 107 P.3d 900, 921 (2005) (Section 13-116 bars consecutive sentence for prohibited possession of weapon used in attempted murder).

¶7 But we reach the opposite result when examining the remaining four counts of prohibited possession. Because Mendoza already possessed one weapon, subtracting the facts necessary to prove each first-degree burglary count still leaves him in possession of two additional weapons during each burglary. And Mendoza plainly could have committed first-degree burglary without the additional firearms.

¹Because neither of the first two factors support consecutive sentences, we need not address the third factor. *See Urquidez*, 213 Ariz. 50, ¶ 7, 138 P.3d at 1179.

STATE v. MENDOZA
Decision of the Court

¶8 Mendoza asserts, however, that the sentences for the remaining four counts of prohibited possession cannot be consecutive to his burglary sentences because the state alleged that his first-degree burglary was based on his having possessed “firearms” instead of a single firearm. Thus, he reasons, “any sentence for the crime of possessing any of the three guns cannot run consecutively to the sentence for the crime of burglarizing the home while possessing all three of the guns.”

¶9 Pursuant to § 13-1508(A), the state was required to prove only that Mendoza possessed a firearm during the burglary to convict him of first-degree burglary. The state’s reference to “firearms” in the indictment does not add elements to the offense or increase the required showing to obtain a conviction. *See State v. Marshall*, 197 Ariz. 496, ¶ 39, 4 P.3d 1039, 1049 (App. 2000) (“Mere mention in the indictment of facts that the State intends to elicit in proving the crime does not transform those facts into elements of the offense.”). Mendoza cites no authority, and we find none, suggesting that the manner in which the state describes offenses in the indictment transforms multiple acts into a single act.

¶10 Additionally, § 13-116 does not prohibit consecutive sentences for multiple violations of the same statute. *See State v. Griffin*, 148 Ariz. 82, 85, 713 P.2d 283, 286 (1986) (no violation of § 13-116 when defendant “charged with and convicted of four counts of the same offense: sexual assault”); *State v. Williams*, 182 Ariz. 548, 562, 898 P.2d 497, 511 (App. 1995) (where “[d]efendant violated the same statute . . . multiple times” in committing sexual assaults, § 13-116 inapplicable). Thus, no legal impediment exists to imposing consecutive prison terms for the prohibited possession of additional firearms during the course of committing first-degree burglary.

¶11 Mendoza also argues we cannot “supersede the trial court’s decision to run all of the prohibited-possessor sentences concurrently” because the court had discretion to do so. *See State v. Garza*, 192 Ariz. 171, ¶ 12, 962 P.2d 898, 901-02 (1998). Thus, he argues, we cannot vacate those sentences or modify his sentence so that any of the prohibited possessor counts run consecutively to each other.

STATE v. MENDOZA
Decision of the Court

¶12 Mendoza is correct that we will not disturb a legal sentence absent an abuse of discretion. *State v. Hernandez*, 231 Ariz. 353, ¶ 3, 295 P.3d 451, 453 (App. 2013). But we are not required to pretend the sentencing court did not consider the aggregate sentence or whether individual sentences could properly be served consecutively or only concurrently. *See State v. Fillmore*, 187 Ariz. 174, 184, 927 P.2d 1303, 1313 (App. 1996) (“[A] trial court must choose, among concurrent and consecutive sentences, whichever mix best fits a defendant’s crimes.”). Because some of the sentences for prohibited possession cannot be consecutive to the corresponding first-degree burglary conviction, it is appropriate for us to vacate all of Mendoza’s sentences to allow the trial court to exercise its full sentencing discretion on remand. *See State v. Viramontes*, 163 Ariz. 334, 340, 788 P.2d 67, 73 (1990) (remanding when supreme court could not determine if trial court would have imposed same sentence had it known consecutive sentences not available); *cf. State v. Lehr*, 205 Ariz. 107, ¶ 8, 67 P.3d 703, 705 (2003) (“With the reversal of two of the murder convictions, the sentencing calculus . . . has changed.”).

¶13 We affirm Mendoza’s convictions but, for the reasons stated, vacate his sentences and remand the case for resentencing consistent with this decision.