IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JASON TAYLOR RUBIN,
Appellant.

No. 2 CA-CR 2016-0154
Filed April 12, 2017

Appeal from the Superior Court in Cochise County
No. CR201500281
The Honorable Wallace R. Hoggatt, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

COUNSEL

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

Law Office of Daniel DeRienzo, PLLC, Prescott Valley
By Daniel J. DeRienzo
Counsel for Appellant

MEMORANDUM DECISION

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

S T A R I N G, Presiding Judge:

¶1 Jason Taylor Rubin appeals from his convictions and sentences for three counts of armed robbery, four counts of knowingly possessing narcotics, and four counts of knowingly obtaining narcotics by fraud, deceit, misrepresentation, or subterfuge. For the reasons that follow, we affirm in part, vacate in part, and remand for resentencing.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *See State v. Gatliff*, 209 Ariz. 362, ¶ 2, 102 P.3d 981, 982 (App. 2004). In April and May 2015, Rubin robbed three separate pharmacies by displaying notes stating he would harm pharmacy employees if they did not give him narcotics. Although the witnesses did not recall the exact wording of the notes, they all testified Rubin threatened to cause deadly harm if they did not cooperate, with some recalling he threatened to detonate a bomb. Witnesses at all three robberies observed wires protruding from Rubin's clothing, and those at two locations also noticed something bulky under his shirt.

¶3 Rubin ultimately confessed to robbing the three pharmacies by using wires and a cell phone charger to simulate a bomb. Officers used an explosives-detection dog to search Rubin's vehicle and residence, but found no evidence of explosives.

¶4 Rubin was charged with three counts of armed robbery, four counts of narcotic possession, and four counts of knowingly obtaining a narcotic by fraud, deceit, misrepresentation, or subterfuge. *See* A.R.S. §§ 13-1904(A)(2), 13-3408(A)(1), (6). After a

five-day jury trial, Rubin was convicted on all eleven counts. The state also alleged, and the jury found, five aggravating factors.

¶5 The trial court sentenced Rubin as a dangerous offender pursuant to A.R.S. § 13-704(A), (F) for his armed robbery convictions. And it applied aggravating factors, including "threatened infliction of serious physical injury" and "threatened use . . . of a deadly weapon or dangerous instrument," to impose maximum sentences on the four counts of obtaining narcotics in violation of § 13-3408(A)(6). *See* A.R.S. §§ 13-701(C), (D)(1)-(2), 13-702(D), 13-703(A)-(B), (H)-(I). The court imposed a combination of concurrent and consecutive prison terms totaling 36.75 years. We have jurisdiction of this appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶6 Rubin argues the trial court erred by enhancing his armed-robbery sentences in the absence of a jury finding or evidence of dangerousness, and by imposing aggravated sentences for four counts of knowingly obtaining narcotics by fraud, deceit, misrepresentation or subterfuge when the jury's aggravation findings did not specify the counts to which they pertained. We review the trial court's application of sentencing statutes de novo. *State v. Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d 263, 266 (App. 2007). Because Rubin failed to raise his objections below, however, he has forfeited any right to appellate relief absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Fundamental error is that "going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

¶7 With the exception 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." *State v. Price*, 217 Ariz. 182, ¶ 8, 171 P.3d 1223, 1225 (2007), *quoting Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). This requirement applies to allegations of aggravating factors

pursuant to § 13-701(D). *See id.* ¶¶ 4, 21; *State v. Martinez*, 210 Ariz. 578, ¶¶ 18-21, 115 P.3d 618, 623-24 (2005). It likewise applies to an allegation of a dangerous offense used to enhance a sentence, unless dangerousness is inherent in the offense. *State v. Gatliff*, 209 Ariz. 362, ¶ 17, 102 P.3d 981, 984-85 (App. 2004). It is fundamental error to increase a defendant's sentence based on a fact not found by a jury beyond a reasonable doubt. *See Henderson*, 210 Ariz. 561, ¶ 25, 115 P.3d at 608.

Dangerous Offense Enhancement

¶8 Rubin first contends the trial court improperly enhanced his sentences for armed robbery pursuant to A.R.S. § 13-704. The definition of "dangerous offense" for purposes of sentencing under § 13-704 requires infliction of serious physical injury or the use or threatening exhibition of an actual weapon in the form of a "[d]angerous instrument" or "[d]eadly weapon." *See* A.R.S. § 13-105(12), (13), (15). The definition of armed robbery, however, explicitly allows conviction based on use or threatened use of a "simulated deadly weapon." A.R.S. § 13-1904(A); *see also State v. Larin*, 233 Ariz. 202, ¶ 41, 310 P.3d 990, 1001 (App. 2013) (armed robbery with simulated weapon not inherently dangerous offense); *Joyner*, 215 Ariz. 134, ¶ 10, 158 P.3d at 267 (simulated weapon "neither deadly nor dangerous").

¶9 Here, there was no jury finding of dangerousness. The state found no evidence of explosives, and the dog handler who searched Rubin's residence and vehicle concluded there were no explosives in either location. Further, the state concedes Rubin's armed-robbery sentences were erroneously enhanced as dangerous offenses. We conclude Rubin has established fundamental, prejudicial error with respect to the enhancement of his sentences for armed robbery, and we therefore vacate his sentences on counts 1, 4, and 7.

Aggravation of Sentences

¶10 Rubin also argues the trial court improperly considered the jury's findings that he "threatened infliction of serious physical injury" and "used, threatened use, or possessed a deadly weapon

during the commission of the crimes" in order to impose aggravated sentences for his four convictions for knowingly obtaining a narcotic by fraud, deceit, misrepresentation or subterfuge. *See* A.R.S. § 13-701(D)(1)-(2). He contends that because the aggravated verdicts did not specify the counts to which they referred, it is possible the jury did not unanimously find he threatened to cause injury and use a deadly weapon during all three robberies.

¶11 Rubin committed all the offenses on separate dates in essentially the same manner: by displaying wires protruding from his clothing and notes that communicated to pharmacy employees that he would harm or kill them if they did not comply with his demands for narcotics. He admitted these essential facts. That he did not have an actual bomb does not mean his communications were not threats. In general, a communication constitutes a threat when it is reasonable for the recipient to interpret it as such. *Cf. State v. Stephens*, 66 Ariz. 219, 226, 186 P.2d 346, 350-51 (1947) (intimidation accomplished through "indirect language of a threatening character" or "conduct . . . reasonably calculated to put the victim in fear"); *In re Ryan A.*, 202 Ariz. 19, ¶ 11, 39 P.3d 543, 546 (App. 2002) ("true threat" established if reasonably foreseeable "statement would be understood . . . as a genuine threat to inflict harm").

¶12 As noted, it is fundamental error to use aggravating factors to increase a defendant's sentence absent a jury finding beyond a reasonable doubt. *Henderson*, 210 Ariz. 561, ¶ 25, 115 P.3d at 608. On this record, reasonable jurors could not have found Rubin guilty of the three robberies without also finding beyond a reasonable doubt that he made the same manner of threats during each of them. *See* A.R.S. § 13-1902(A) ("person commits robbery if in the course of taking any property of another . . . such person threatens or uses force against any person"); *Henderson*, 210 Ariz. 561, ¶ 28, 115 P.3d at 609 (prejudice established when "reasonable jury, applying the correct standard of proof, could have failed to find the existence of each aggravator"). Thus, we conclude Rubin has not established the lack of specificity in the jury's aggravation findings deprived him of a fair trial. *See id.* ¶¶ 19-20. Although he

has established fundamental error, he has not established prejudice. *See id.*

Disposition

¶13 For the foregoing reasons, we vacate Rubin's sentences on counts 1, 4, and 7 and remand for resentencing as to those counts. We affirm Rubin's remaining convictions and sentences.