

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

JAMES BYRON BACA,  
*Appellant.*

No. 2 CA-CR 2016-0314  
Filed July 24, 2017

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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NOT FOR PUBLICATION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.*

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Appeal from the Superior Court in Pima County  
No. CR20150929002

The Honorable Teresa Godoy, Judge Pro Tempore

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
Joseph T. Maziarz, Chief Counsel, Phoenix  
By Amy Pignatella Cain, Assistant Attorney General, Tucson  
*Counsel for Appellee*

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Robert A. Kerry, Tucson  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Presiding Judge Vásquez authored the decision of the Court, in which Judge Staring and Judge Kelly<sup>1</sup> concurred.

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V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, James Baca was convicted of first-degree trafficking in stolen property, theft of a means of transportation, theft of property or services, third-degree burglary, and possession of burglary tools. Baca's convictions stem from his February 2015 theft of a van that contained tools and equipment valued at more than \$4,000. The trial court sentenced him to concurrent prison terms, the longest of which was a 15.75-year term for trafficking in stolen property, a class two felony. A.R.S. § 13-2307(B)-(C). Baca's sentences were enhanced based on Baca's four historical prior felony convictions. *See* A.R.S. § 13-703(C), (J). Baca argues on appeal that his 15.75-year sentence constitutes cruel and unusual punishment and thus violates the United States and Arizona constitutions.<sup>2</sup> We affirm.

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<sup>1</sup>The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

<sup>2</sup>Baca acknowledges he did not raise this claim below and therefore has forfeited the right to relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). An unconstitutional sentence, however, constitutes fundamental error. *See State v. Price*, 217 Ariz. 182, ¶ 21, 171 P.3d 1223, 1227-28 (2007).

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¶2 “Both the United States and Arizona constitutions prohibit cruel and unusual punishment.”<sup>3</sup> *State v. Florez*, 241 Ariz. 121, ¶ 22, 384 P.3d 335, 341 (App. 2016); *see also* U.S. Const. amend. VIII; Ariz. Const. art. II, § 15. The length of a sentence can render it unconstitutional if the sentence is “grossly disproportionate to the crime.” *Florez*, 241 Ariz. 121, ¶ 22, 384 P.3d at 342, *quoting State v. Berger*, 212 Ariz. 473, ¶ 10, 134 P.3d 378, 380 (2006). In analyzing a sentence under the Eighth Amendment, we first determine whether the defendant has made “a threshold showing of gross disproportionality by comparing the gravity of the offense [and] the harshness of the penalty.” *Id.* ¶ 23, *quoting Berger*, 212 Ariz. 473, ¶ 12, 134 P.3d at 381 (alteration in *Berger*). In doing so, we defer to the legislature’s policy judgment, as reflected by the governing sentencing statutes. *Id.* A sentence “is not grossly disproportionate to the crime if it ‘arguably furthers the State’s penological goals’ and ‘reflects a rational legislative judgment’ to which the court owes deference.” *Id.*, *quoting Berger*, 212 Ariz. 473, ¶ 17, 134 P.3d at 382. If there is an “inference of gross disproportionality,” we will then “test that inference by conducting inter-jurisdictional and intra-jurisdictional comparative analyses.”<sup>4</sup> *Id.*

¶3 Baca argues his sentence has no legitimate penological goal because it is similar to the sentence a person convicted of second-degree murder could receive. *See* A.R.S. § 13-710(A). In support, he cites the United States Supreme Court’s observation in *Solem v. Helm*, 463 U.S. 277, 291 (1983), that if the penalty is the same for a more serious crime, “that is some indication that the punishment at issue

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<sup>3</sup>Although Baca raises this claim in the context of both the United States and Arizona constitutions, he does not develop a separate argument regarding the Arizona Constitution. It is thus waived on appeal. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

<sup>4</sup>Additionally, in extremely rare cases, “the specific application” of an otherwise constitutional sentencing scheme “to the facts of a defendant’s case may result in an unconstitutionally disproportionate sentence.” *Florez*, 241 Ariz. 121, ¶ 23, 384 P.3d at 342. Baca does not assert that he falls into this category of cases.

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may be excessive.” But Baca seems to conflate the first step of our analysis – determining whether the sentence serves some reasonable penological interest – with the second step of conducting a proportionality analysis. As the Supreme Court has also recognized, increased sentences for recidivists like Baca support the reasonable “public-safety interest in incapacitating and deterring recidivist felons.” *Ewing v. California*, 538 U.S. 11, 29 (2003). The mere fact the sentence may be equivalent to that of a person convicted of second-degree murder does not render that interest improper or Baca’s sentence disproportionate. In fact, the Supreme Court has held a substantially longer sentence for a less serious property crime does not violate the Eighth Amendment. *Id.* at 28-29 (affirming “sentence of 25 years to life” for recidivist convicted of “felony grand theft for stealing nearly \$1,200 worth of merchandise”). Baca has offered no basis to distinguish *Ewing*, and we find none. Because he has not made the required threshold showing that his sentence is grossly disproportionate, his claim fails.

¶4 We affirm Baca’s convictions and sentences.