IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CHRISTOPHER DANIEL TREJO,
Appellant.

No. 2 CA-CR 2017-0422
Filed August 23, 2019

Appeal from the Superior Court in Pima County
No. CR20022147
The Honorable Joan L. Wagener, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

COUNSEL

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

Scott A. Martin, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Eppich concurred.

S T A R I N G, Presiding Judge:

¶1 Christopher Trejo appeals from the sentences imposed when he was resentenced for armed robbery, aggravated robbery, kidnapping, conspiracy, fleeing from a law enforcement vehicle, two counts of aggravated assault, and two counts of first-degree burglary following the trial court's grant of relief pursuant to Rule 32, Ariz. R. Crim. P. He argues, based on the court's earlier Rule 32 ruling, that the court erred by ordering the aggravated assault sentences to be consecutive to each other and to other sentences. He also argues that imposing consecutive sentences for aggravated assault violates the constitutional prohibition against double jeopardy. For the reasons that follow, we affirm all but one of his sentences, which we vacate, and we remand for further proceedings consistent with this decision.

Factual and Procedural Background

¶2 In 2002, Trejo and at least one other man entered L.H.'s home holding guns and wearing ski masks, gloves, and camouflage clothing. The men forced L.H., who was in a wheelchair, and A.S. onto the floor, and bound their arms behind their backs. Trejo then shocked L.H. several times with a high-voltage stun gun, and demanded to know where L.H. kept guns, money, and drugs. The men stole jewelry, more than fifty guns, and L.H.'s car. Shortly thereafter, Trejo and two other men fled in a car, shooting at pursuing police officers.

¶3 A jury found Trejo guilty of fourteen counts related to the home invasion and subsequent flight from the police. The trial court sentenced him to a combination of consecutive and concurrent, aggravated prison terms totaling 77.5 years. Relevant to this appeal, Trejo was convicted for the armed robbery of L.H. and A.S. (count four), the aggravated assault of L.H. (count six), and the aggravated assault of A.S. (count seven). The court ordered that the sentence for count six be consecutive to a combination of concurrent sentences imposed for his other convictions, of which the sentence for count four was the longest. The court additionally ordered that the sentence for count seven be consecutive to the

sentence for count six. We affirmed Trejo's convictions and sentences on appeal. *State v. Trejo*, No. 2 CA-CR 2004-0010 (Ariz. App. June 10, 2005) (mem. decision).

¶4 In 2015, Trejo sought post-conviction relief pursuant to Rule 32[1] arguing, among other things, that his sentences for counts six and seven were required to be concurrent with his sentence for count four under A.R.S. § 13-116 and *State v. Gordon*, 161 Ariz. 308 (1989). Specifically, he argued his sentences for counts six and seven must be concurrent with count four because the convictions involved the same core criminal conduct and risk of harm to the victims. He also alleged that his trial counsel had been ineffective for failing to object to the consecutive sentences imposed on counts six and seven.

¶5 The trial court agreed with Trejo that "the armed robbery and aggravated assaults of [L.H.] and [A.S.] were the same act under A.R.S. § 13-116." Accordingly, the court ruled that Trejo's sentences for count four and counts six and seven "must thus run concurrently, not consecutively." The court added that his sentences for counts six and seven "remain consecutive to each other because acts causing harm to multiple victims may run consecutively even if they stem from the same act under A.R.S. § 13-116." The court ordered that Trejo was therefore "entitled to re-sentencing as to Counts Four, Six and Seven."[2]

¶6 Before resentencing, Trejo filed a "motion to avoid error in re-sentencing," arguing that counts six and seven must run concurrently with each other and count four because the "State chose to charge . . . Trejo with a single count of armed robbery involving both victims," and then charged him with the aggravated assault of each victim in separate counts. At resentencing, the trial court denied Trejo's motion and resentenced him according to its Rule 32 ruling. The court: (1) affirmed the sentence for count four to run concurrent with the sentences imposed for counts two, three, and five; (2) ordered the sentence for count six to run concurrent with the sentence for count four, but consecutive to the sentences for counts two, three, and five, commencing after the sentences for counts two, three, and

[1]Trejo believed he had retained appellate counsel to represent him in both his direct appeal and post-conviction proceedings. However, his appellate counsel did not initiate proceedings for post-conviction relief on his behalf. Therefore, the trial court treated his pro se Rule 32 petition as his notice of petition for post-conviction relief and appointed counsel.

[2]The trial court also vacated five of Trejo's convictions and sentences.

five have been fully served; and (3) ordered the sentence for count seven to run concurrent with the sentence for count four, but consecutive to the sentence for count six, commencing after that sentence has been fully served. The longest sentence of counts two, three, and five is ten years, the sentence on count four is fifteen years, and the sentence for both counts six and seven is ten years. Therefore, the court ordered Trejo to begin serving the sentence for count six after ten years of his count four sentence have elapsed, and to begin serving count seven's sentence five years after the sentence for count four is completed.

¶7 After resentencing, Trejo filed a "motion to correct sentence," arguing that "[b]ecause Counts Two, Three, Four and Five are running concurrent to one another, Count Six then must necessarily run concurrent with not only Count Four, but also Counts Two, Three and Five." The trial court denied his motion because Trejo "failed to raise his present argument that Counts Two, Three and Five must run concurrent to Count Six in his Rule 32 Petition." This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

De Facto Consecutive Sentence

¶8 Trejo argues the trial court erred by ordering the sentences for counts six and seven consecutive to each other and to other sentences. Specifically, he argues that running the sentences for counts six and seven consecutive to each other and running the sentence for count six to be consecutive to the sentences for counts two, three, and five, "made true concurrent sentences" with count four "a *de facto* impossibility." We will not disturb a sentence unless the court has abused its discretion, *see State v. Vermuele*, 226 Ariz. 399, ¶ 15 (App. 2011), but we review whether consecutive sentences are permissible de novo, *see State v. Lambright*, 243 Ariz. 244, ¶ 9 (App. 2017).

¶9 Section 13-116 provides: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." Thus, § 13-116 "precludes the imposition of consecutive sentences if the defendant's conduct is deemed a 'single act.'" *State v. Carreon*, 210 Ariz. 54, ¶ 102 (2005). To determine whether a defendant's conduct constituted a single act, the court focuses on the facts of the transaction and subtracts "the evidence necessary to convict on the ultimate

charge . . . . If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under . . . § 13-116." *Gordon*, 161 Ariz. at 315. "The transaction is more likely to represent a single act if it was factually impossible to commit [the ultimate] crime without committing the other; conversely, the transaction more likely involved multiple acts if the different crimes caused a victim to suffer an additional or different risk of harm." *State v. McDonagh*, 232 Ariz. 247, ¶ 12 (App. 2013); *see also Gordon*, 161 Ariz. at 315.

¶10 Taking away the facts necessary to convict Trejo of the ultimate charge, armed robbery, the trial court found "the record contains no evidence of an act with a handgun that could have placed [the victims] in 'reasonable apprehension of imminent physical injury'" under the aggravated assault statute. The court also found it was "factually impossible for [Trejo] to have committed . . . armed robbery . . . without also committing aggravated assault against the victims," and that Trejo's actions exposed the victims "to the same risks in committing both armed robbery and aggravated assault." Thus, the court concluded Trejo's conduct was the same act under § 13-116.

Count Six

¶11 Trejo argues "the sentences ultimately imposed by the trial court on Counts 6 and 7 were [not] legally permissible given" its ruling that the sentences for counts six and seven must be concurrent to the sentence for count four because the convictions were based on the same act.[3] At resentencing, the court ordered the sentence for count six to be "concurrent with" the sentence for count four, but Trejo contends this order was "illusory" because the court also ordered the sentence for count six be "consecutive to" the sentences for counts two, three, and five. Thus, he asserts "as a practical matter he will be serving mostly consecutive sentences" for counts six and four "and therefore [will] be punished twice for the same conduct." He argues the "proper course" was for the court to order the sentence imposed for count six to begin on the same date as the concurrent sentence for count four, "notwithstanding any residual consecutive relationship" to the sentences on counts two, three, and five.

[3]Because neither party petitioned for review of the trial court's Rule 32 ruling, any challenge to it is waived. *See* Ariz. R. Crim. P. 32.9(c)(4)(D) ("A party's failure to raise any issue that could be raised in the petition or cross-petition for review constitutes a waiver of appellate review of that issue.").

The state counters that "consecutive sentencing was permissible on the armed-robbery conviction and each of the two assault convictions (notwithstanding the resentencing court's contrary conclusion)," and that "the prohibition against consecutive sentencing on convictions for two (or more) offenses that constitute a single act . . . should be construed to be limited to sentencing based solely on those two convictions."

¶12 "A concurrent sentence is one which runs simultaneously with another." *Washington v. State*, 10 Ariz. App. 95, 97 (1969). Unlike concurrent sentences, consecutive sentences "run only after prior sentences have been completed." *Id.* And "[c]oncurrent sentences which run simultaneously do not necessarily end and begin at the same time." *Id.* For example, concurrent sentences may be imposed at different times or for different periods of time, only running simultaneously during the time they overlap. *See id.* at 96-97; *see also Bullard v. Dep't of Corr.*, 949 P.2d 999, 1002 (Colo. 1997) ("When two sentences run concurrently, it merely means that, for each day in custody while serving both sentences, the inmate receives credit toward each sentence. Concurrent sentences do not necessarily begin and end at the same time—they simply run together during the time that they overlap.").

¶13 The sentence for count six does not begin at the same time as the sentence for count four because the count six sentence is consecutive to the sentences imposed for counts two, three, and five, but the sentences for counts six and four do overlap for a period of five years. Therefore, the sentence for count six is concurrent to the sentence for count four. *See Bullard*, 949 P.2d at 1002. Trejo's Rule 32 relief was limited to resentencing "as to Counts Four, Six and Seven." The original consecutive relationship between the sentences for count six and counts two, three, and five was not the subject of resentencing. The trial court changed the relationship between the sentences for counts six and four from consecutive to concurrent pursuant to its Rule 32 ruling, while keeping the sentence for count six consecutive to those for counts two, three, and five. Thus, the court did not err because the sentence for count six is concurrent with the sentence for count four in accord with § 13-116 and *Gordon*.

Count Seven

¶14 Similarly, Trejo argues the sentence for count seven must also be served concurrently with the sentence for count four "[f]or the same reasons" as for the sentence imposed for count six. The trial court at resentencing ordered the sentence for count seven to be "concurrent with the sentence imposed as to Count Four and consecutive to the sentence

imposed as to Count Six." The court ordered the sentence for count seven to be consecutive to the sentence for count six "because acts causing harm to multiple victims may run consecutively even if they stem from the same act under . . . § 13-116." *See State v. Hampton*, 213 Ariz. 167, ¶ 65 (2006). Trejo concedes "[t]his is an accurate statement of the law," but argues "it is an illegal sentence under the facts of this case" because "running the sentence for count 7 consecutive with count 6 makes it impossible for the sentence for count 7 to be concurrent with the sentence for count 4." He asserts "[t]his unusual situation arises here due to the fact that the State chose to prosecute the armed robbery of [L.H.] and [A.S.] in a single count . . . rather than two counts of armed robbery, one for each victim." We agree.

¶15 Because the trial court ordered the sentence for count seven to be consecutive to count six, Trejo does not begin serving the sentence for count seven until five years after he has fully served the sentence for count four. Thus, there is no overlap between the sentences for counts seven and four, which means they are not concurrent. *See Washington*, 10 Ariz. App. at 97 (concurrent sentences are "distinct from those sentences which run only after prior sentences have been completed"); *see also Bullard*, 949 P.2d at 1002. As noted, making the sentences for counts six and seven consecutive would normally be permissible, but because count four includes both victims and the sentence for count six is consecutive to counts two, three, and five,[4] it is impossible for the sentence for count seven to be consecutive to the sentence for count six and still be concurrent with the sentence imposed for count four. Pursuant to the court's Rule 32 ruling, the sentence for count seven must be concurrent with that for count four under § 13-116 and *Gordon*. Accordingly, the court erred by not sentencing Trejo to serve the sentence imposed for count seven concurrent with the sentence for count four.

Double Jeopardy

¶16 Trejo argues it was fundamental error for the trial court to impose sentences in counts six and seven that are "*de facto* consecutive" to the count four sentence because it violates the prohibition against double

[4]If the sentence for count six was not consecutive to the sentences for counts two, three, and five, the sentences for counts six and seven could have been consecutive to each other and still be concurrent with the count four sentence because the count six sentence would entirely overlap and the sentences for count seven and count four would partially overlap.

jeopardy. We review whether double jeopardy applies de novo. *See State v. Brown*, 217 Ariz. 617, ¶ 12 (App. 2008). However, because Trejo did not raise this issue below, we review his claim only for fundamental error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018).[5] But a double jeopardy violation constitutes fundamental error. *See State v. Jurden*, 239 Ariz. 526, ¶ 7 (2016).

¶17 The Double Jeopardy Clauses of the United States and Arizona Constitutions prohibit multiple prosecutions for the same offense. *See* U.S. Const. amend. V; Ariz. Const. art. II, § 10; *see also State v. Garcia*, 235 Ariz. 627, ¶ 5 (App. 2014). "[G]reater and lesser-included offenses are considered the 'same offense'" for double jeopardy purposes. *Garcia*, 235 Ariz. 627, ¶ 5. Under the "same elements" test, two offenses are not the same when each requires proof of an additional fact the other does not. *See State v. Price*, 218 Ariz. 311, ¶ 5 (App. 2008). Under the "charging document test," the offenses are the same when "the charging document describes the lesser offense even though [it] would not always form a constituent part of the greater offense." *State v. Ortega*, 220 Ariz. 320, ¶ 12 (App. 2008) (alteration in *Ortega*) (quoting *In re Jerry C.*, 214 Ariz. 270, ¶ 11 (App. 2007)). Trejo argues that under the charging documents test, the aggravated assaults in counts six and seven were lesser-included offenses of the armed robbery in count four. However, using the same elements test in *Price*, we concluded that "for double jeopardy purposes, aggravated assault is not the same offense as armed robbery." 218 Ariz. 311, ¶¶ 5, 9. Convictions for both offenses are therefore permissible. *Id.* ¶ 9.

¶18 Despite our holding in *Price*, Trejo urges us to apply the charging documents test here. We decline to do so. *See State v. Dungan*, 149 Ariz. 357, 361 (App. 1985) ("The principle of stare decisis dictates that previous decisions of this court are considered highly persuasive and binding, unless we are convinced that the prior decision is clearly erroneous

[5]A defendant who fails to object at trial forfeits the right to appellate relief unless he can show trial error exists, and that the error went to the foundation of the case, took from him a right essential to his defense, or was so egregious that he could not possibly have received a fair trial. *See Escalante*, 245 Ariz. 135, ¶ 21. If a defendant can show an error went to the foundation of the case or deprived him of a right essential to his defense, he must also separately show prejudice resulted from the error. *Id.* If a defendant shows the error was so egregious he could not have received a fair trial, however, he has necessarily shown prejudice and must receive a new trial. *Id.*

or conditions have changed so as to render the prior decision inapplicable."). In *United States v. Dixon*, 509 U.S. 688 (1993), the Supreme Court held that the same elements test "is the only permissible interpretation of the double jeopardy clause."[6] *State v. Sanders*, 205 Ariz. 208, ¶ 65 (App. 2003), *overruled on other grounds by State v. Freeney*, 223 Ariz. 110, ¶¶ 24–26 (2009); *see also Price*, 218 Ariz. 311, ¶ 5 & n.1; *State v. Siddle*, 202 Ariz. 512, ¶ 10 (App. 2002). *But see State v. Marshall*, 197 Ariz. 496, ¶ 31 (App. 2000) (applying charging documents test to determine lesser-included offense); *State v. Welch*, 198 Ariz. 554, ¶¶ 7–13 (App. 2000) (recognizing charging documents test, but applying same elements test); *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 12 (App. 1998) (applying charging documents test).

¶19 Accordingly, we conclude *Price* controls, and aggravated assault is not the same offense as armed robbery for double jeopardy purposes.

Disposition

¶20 For the foregoing reasons, we vacate Trejo's sentence on count seven and remand the matter to the trial court for the limited purpose of resentencing on that count; we otherwise affirm his convictions and remaining sentences.

[6]Trejo argues for the first time in his reply brief that we should interpret article II, § 10 of the Arizona Constitution more broadly than the United States Constitution's double jeopardy provisions, because *Dixon* does not control a claim under the Arizona Constitution. However, an argument raised for the first time in a reply brief is waived. *See State v. Brown*, 233 Ariz. 153, ¶ 28 (App. 2013); *see also Lemke v. Rayes*, 213 Ariz. 232, n.2 (App. 2006) (Arizona and federal double jeopardy provisions coextensive).