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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DALE HUNTINGTON, Appellant.	2 CA-CR 2008-0004 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063935

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt — Tucson
Attorneys for Appellee

John William Lovell — Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Dale Huntington was convicted of twelve counts of aggravated assault with a deadly weapon, five counts of armed robbery, one count of attempted armed robbery, three counts of burglary, and two counts of kidnapping. He was sentenced to several concurrent prison terms, the longest for 11.25 years, and to a consecutive prison term of 15.75 years. On appeal, Huntington argues the state presented insufficient evidence to support several of his aggravated assault convictions and the dangerous-nature findings on certain convictions. He further argues the trial court erred in pronouncing his sentences for certain convictions. Because sufficient evidence was presented to support all of the convictions and dangerous-nature findings, we affirm them. We also affirm Huntington's sentences, as subsequently clarified by the trial court.

Facts

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Huntington robbed the same bank on September 8 and September 22, 2006. He robbed a different bank on October 13, 2006. In each robbery, Huntington held a shotgun and demanded money from bank employees.

¶3 Huntington was apprehended on October 16, 2006. While searching his truck, police found a guitar case containing a loaded shotgun, a blue bag, and clothing matching bank employees' descriptions of the clothing worn by the robber in all three robberies.

¶4 The state charged Huntington with five counts of armed robbery, one count of attempted armed robbery, three counts of first-degree burglary, two counts of kidnapping, and twelve counts of aggravated assault with a deadly weapon.[1] Certain charges were also alleged to be of a dangerous nature. At trial, employees from both banks testified that, during each robbery, the robber had displayed what appeared to be a single-barrel shotgun. The jury found Huntington guilty of all charges.

Insufficiency of the Evidence

¶5 Huntington first argues that the evidence was insufficient to support his convictions for six counts of aggravated assault with a deadly weapon and the jury's dangerous-nature findings with respect to his convictions for attempted armed robbery, one count of kidnapping, and three counts of armed robbery. He bases this argument on his claim that the state failed to produce sufficient evidence that he had used a real shotgun in each robbery.[2]

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[1]Huntington was also charged with a thirteenth count of aggravated assault, a sixth count of armed robbery, and a fourth count of burglary, as well as a weapons violation. The court granted judgment of acquittal on the weapons violation and aggravated assault counts. The armed robbery and burglary counts were tried separately pursuant to stipulation.

[2]Although Huntington moved for acquittal pursuant to Rule 20, Ariz. R. Crim. P., on some of the counts he now challenges, he did not make a motion on all of them. Any claim on those omitted counts is therefore forfeited absent fundamental error. *See State v. Stroud*, 209 Ariz. 410, n.2, 103 P.3d 912, 914 n.2 (2005). However, a conviction that is not supported by sufficient evidence does constitute fundamental error. *Id.* Similarly, a dangerous-nature sentence enhancement that is not supported by sufficient evidence also constitutes fundamental error because such a sentence is illegal. *See State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002) (erroneous sentence enhancement results in illegal sentence and fundamental error); *State v. Munninger*, 209 Ariz. 473, ¶ 11, 104 P.3d

¶6 When considering claims of insufficient evidence, "we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction." *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). Substantial evidence is "evidence that 'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913-14 (2005), *quoting State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997). "Evidence may be direct or circumstantial, but if reasonable minds can differ on inferences to be drawn therefrom, the case must be submitted to the jury." *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (citation omitted). "The finder-of-fact, not the appellate court, weighs the evidence and determines the credibility of witnesses." *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995).

¶7 To convict a defendant of aggravated assault with a deadly weapon, the state must prove, inter alia, that the defendant used a deadly weapon or dangerous instrument in committing the assault. *See* A.R.S. § 13-1204(A)(2). A defendant's sentence may be enhanced if the state proves that the offense committed was of a dangerous nature. A.R.S. § 13-604(I), renumbered as § 13-704(A).[3] As relevant here, an offense is dangerous in nature

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204, 209 (App. 2005), *abrogated on other grounds by State v. Martinez*, 210 Ariz. 578, 115 P.3d 618 (2005) (failure to submit sentence-enhancement allegation to jury results in illegal sentence and fundamental error).

[3]Although significant portions of the Arizona criminal sentencing code have been renumbered effective December 31, 2008, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-27, we refer in this decision to the statutes as they were numbered when Huntington committed his offenses.

if the defendant used or exhibited a deadly weapon or dangerous instrument during the commission of the offense. A.R.S. § 13-105(13). A dangerous instrument is "anything that under the circumstances . . . is readily capable of causing death or serious physical injury." § 13-105(12). A deadly weapon is "anything designed for lethal use, including a firearm." § 13-105(15). Unless there is a reasonable doubt as to the operability of a deadly weapon or dangerous instrument, the state has no burden to prove that the instrument or weapon is operable or authentic. *See State v. Valles*, 162 Ariz. 1, 7, 780 P.2d 1049, 1055 (1989); *see also State v. Jones*, 26 Ariz. App. 66, 68, 546 P.2d 43, 45 (1976) (testimony witness thought defendant's gun was real sufficient to convict defendant of armed robbery).

¶8 Huntington argues the victims in the challenged counts never testified that they saw he was carrying a gun or weapon and instead merely stated he might have been carrying a weapon. He also contends "[t]here was absolutely no testimony from any of the victims that [he] used a real [or operable] . . . weapon during the robberies."

¶9 But both direct and circumstantial evidence was presented from which the jury could conclude that Huntington carried an authentic and operable weapon in each robbery. *See Landrigan*, 176 Ariz. at 4, 859 P.2d at 114 (evidence can be direct or circumstantial). Bank employees testified that, during the first robbery on September 8, 2006, the robber carried an object that was approximately two and a half feet long that "looked like a gun." A bank employee also testified that when the robber returned to that bank on September 22, he carried a single-barrel shotgun that was "the same object . . . used [in the first robbery] on

September 8." Finally, an employee from the second bank testified that, during the October 13 robbery, the robber had also carried what "appeared to have [been] a shotgun." In each robbery, the robber at least partially hid the shotgun under a blue bag with a "Camel" logo. And police found a loaded shotgun matching the description given by the victims, a blue bag with a "Camel" logo, and clothing witnesses had described the robber as wearing, in Huntington's car just days after the last robbery was committed. This constitutes substantial evidence from which the jurors could conclude beyond a reasonable doubt that Huntington used an authentic and operable shotgun in each robbery. *See Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d at 913-14.

Sentencing

¶10 Huntington next argues the trial court erred when it sentenced him to "'the presumptive term of 15 years'" for his aggravated assault convictions arising from the September 22 robbery. Citing former A.R.S. § 13-702.02, Huntington contends that 7.5 years is the presumptive term for these convictions.

¶11 In its oral pronouncement, the trial court sentenced Huntington to "the presumptive term of 15 years" for his aggravated assault convictions arising from the September 22 robbery. The sentencing minute entry, on the other hand, states that Huntington was sentenced for those crimes to the maximum term of fifteen years but does not identify any aggravating factors. Within sixty days, however, the trial court corrected the inconsistencies between its minute entry and oral pronouncement of sentence and clarified

that it had intended to sentence Huntington to a presumptive term of 7.5 years for his September 22 aggravated assault convictions. *See* Ariz. R. Crim. P. 24.3 (trial court may correct illegal sentence within sixty days of sentence but before perfection of appeal); *State v. Anderson*, 181 Ariz. 18, 19, 887 P.2d 548, 549 (App. 1993) (appeal perfected fifteen days after record on appeal filed in appellate court). These offenses were class three, "second dangerous felony" offenses under § 13-702.02(B), for which the presumptive sentence is 7.5 years. *See* § 13-1204(B); § 13-702.02(A), (B)(1). Accordingly, the trial court timely corrected its error, and we affirm Huntington's sentences.

Conclusion

¶12 In light of the foregoing, we conclude that sufficient evidence supported Huntington's convictions and also conclude that he was properly sentenced. We therefore affirm his convictions and sentences.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge