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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THE STATE OF ARIZONA, Appellee, v. KELVIN JEROME HOUSTON, Appellant.	2 CA-CR 2008-0320 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court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-20073602

Honorable Richard Nichols, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 After a jury trial,[1] appellant Kelvin Houston was convicted of one count of aggravated domestic violence and one count of disorderly conduct, a class six felony and dangerous nature offense involving the use of a dangerous weapon. The trial court sentenced him to concurrent, presumptive prison terms, the longest of which was 2.25 years. On appeal, Houston contends the trial court erred in enhancing his sentence for the disorderly conduct conviction. Because the court did not err, we affirm.

¶2 A person is guilty of felony disorderly conduct if, "with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, [that] person . . . [r]ecklessly handles [or] displays . . . a . . . dangerous instrument." A.R.S. § 13-2904(A)(6).[2] At sentencing, the court enhanced Houston's disorderly conduct conviction pursuant to A.R.S. § 13-604 based on the dangerous nature of the offense.[3]

[1]The sentencing minute entry indicates that Houston pled guilty and was not convicted after a jury trial. The record and the trial court's oral pronouncement of sentence, however, clearly show that Houston was found guilty after a jury trial.

[2]Neither the verdict nor the sentencing minute entry indicates under which subsection of § 13-2904 Houston was convicted. Nevertheless, as Houston notes, the jury was instructed on the elements of subsection (A)(6). Moreover, a disorderly conduct conviction under any other subsection of § 13-2904 is considered a misdemeanor, not a felony. § 13-2904(B). We therefore presume that Houston was convicted and sentenced under subsection (A)(6).

[3]Significant portions of the Arizona criminal sentencing code have been renumbered, effective December 31, 2008. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For consistency with the trial court record and because the renumbering included no substantive changes, *see* 2008 Ariz. Sess. Laws, ch. 301, § 119, we refer in this decision to the prior statute numbers rather than those currently in effect.

Section 13-604(F)[4] provides for enhanced sentencing when a person is convicted of a felony involving the "use or threatening exhibition of a deadly weapon or dangerous instrument."[5]

¶3 Houston claims the trial court improperly enhanced his sentence for disorderly conduct. He did not object to the enhancement at sentencing, however, and has therefore forfeited his right to appellate relief absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Nevertheless, an illegal sentence generally constitutes fundamental error. *State v. Soria*, 217 Ariz. 101, ¶ 4, 170 P.3d 710, 711 (App. 2007).

¶4 Relying on our supreme court's holding in *State v. Orduno*, 159 Ariz. 564, 769 P.2d 1010 (1989), Houston claims the trial court erred in enhancing his sentence for disorderly conduct because the "use or exhibition of a . . . dangerous instrument increases the seriousness . . . of [the crime of] disorderly conduct" and therefore cannot also be used to "further enhance" the sentence for that crime. In *Orduno*, our supreme court considered whether the operation of a motor vehicle as a dangerous instrument in a

[4]Neither the oral pronouncement of sentence nor the sentencing minute entry indicates under which subsection of § 13-604 Houston's sentence was enhanced. The trial court did state, however, that it was sentencing Houston to a "presumptive term of two and a quarter years." The only subsection of § 13-604 providing a presumptive term of 2.25 years for a class six felony conviction is subsection F. But § 13-604(F) also states that a defendant may only be sentenced under it if he has not "previously been convicted of any felony," and Houston appears to have at least one other felony conviction.

[5]The state does not claim that the use of a deadly weapon or dangerous instrument in § 13-2904 is not included in the definition of dangerous offense for purposes of § 13-604.

driving-under-the-influence-of-an-intoxicant (DUI) case could also be deemed the use of a dangerous instrument for sentence-enhancement purposes under § 13-604. 159 Ariz. at 565-66, 769 P.2d at 1011-12. Explicitly limiting its holding to the DUI context, the *Orduno* court held that it could not, because the sentence-enhancing factor—the vehicle being used as a dangerous instrument—was also a necessarily included essential element of the offense. *Id.* at 567, 769 P.2d at 1013. The court stated:

> In the present case, the state does not seek to enhance punishment because the defendant committed the offense with a dangerous instrument that happened to be a motor vehicle. Rather, the state is seeking to use an essential and necessary element of the crime with which defendant is charged, i.e., the operation of a motor vehicle, as the sole factor to enhance his sentence under . . . § 13-604(F).

159 Ariz. at 566, 769 P.2d at 1012.

¶5 Houston acknowledges that *Orduno*'s holding was "limited to the DUI context" but nevertheless asks this court to use the same analysis to extend *Orduno*'s reach to encompass his felony disorderly conduct conviction. Houston asserts that like the DUI in *Orduno*, "[f]elony disorderly conduct under § 13-2904(A)(6) cannot be committed without the use or exhibition" of a deadly weapon. Relying on *Orduno*'s analysis, he therefore claims that "the legislature cannot have intended that the sentence for that crime be further enhanced by the use or exhibition of a deadly weapon."

¶6 In *State v. Lara*, 171 Ariz. 282, 283, 830 P.2d 803, 804 (1992), however, our supreme court affirmed its determination that *Orduno*'s holding is strictly limited to DUI cases and cannot be extended. The *Lara* court also held that the proper rule to

follow in non-DUI cases was the rule enunciated in *State v. Bly*, 127 Ariz. 370, 621 P.2d 279 (1980). *Lara*, 171 Ariz. at 285, 830 P.2d at 806. In *Bly*, our supreme court held that the use of a deadly weapon can serve to increase the seriousness of a crime and to enhance and aggravate its sentence. 127 Ariz. at 372-73, 621 P.2d at 281-82.

¶7 *Bly* addressed the crime of armed robbery, however, and Houston therefore attempts to distinguish its holding from his case by arguing that the use of a weapon in *Bly* was not an irreducible element of the offense because armed robbery can be committed "both by the use of a gun and also by use of a simulated gun." *See id.* at 371. Although Houston's contention is true, it does not appear to have played any part in the *Bly* court's reasoning or in the rule it announced. Additionally, if the legislature, as Houston claims, disagreed with this result, it could certainly have made its intent clear during the seventeen years that have passed since *Lara*'s publication. 171 Ariz. 282, 830 P.2d 803.

¶8 Houston also argues that this court should ignore our supreme court's holding in *Lara* because *Lara*'s assertion that "*Orduno*'s application is limited to DUIs" is merely "dictum" and likely resulted from the court's having been "inundated with *Orduno*-based claims." We reject Houston's suggestion that "*Orduno*-based claims" do not receive meaningful analysis. Furthermore, as we have explained above, *Bly* is directly on point. "This court is bound by the decisions of the supreme court and has 'no authority to overrule, modify, or disregard them.'" *State v. Miranda*, 198 Ariz. 426, ¶ 13,

10 P.3d 1213, 1216 (App. 2000), *approved*, 200 Ariz. 67, 22 P.3d 506 (2001), *quoting State v. Thompson*, 194 Ariz. 295, ¶ 20, 981 P.2d 595, 598 (App. 1999).

¶9 Houston also contends that *Lara*'s holding should not apply in this case because *Lara* "did not address the use of an irreducible element to *enhance* a sentence." *Lara* was a consolidated appeal of two separate cases—*State v. Malone*, 171 Ariz. 321, 830 P.2d 842 (App. 1991), and *State v. Lara*, 170 Ariz. 203, 823 P.2d 70 (App. 1990). In *Malone*, the defendant was convicted of an offense made more serious by the use of a weapon, armed robbery. 171 Ariz. at 322, 830 P.2d at 843. Malone was then given an enhanced and aggravated sentence based upon the same factor used to increase the seriousness of his crime—the use of a weapon during the crime's commission. *Lara*, 171 Ariz. at 282-83, 830 P.2d at 803-04. The use of the weapon, however, was not an essential element of the underlying offense. *See id.* In *Lara*, as in *Malone*, the defendant's manslaughter sentence was aggravated by an element of the offense of which he was convicted, the death of the victim. *Id.* at 283, 830 P.2d at 804. Unlike *Malone*, however, in *Lara* that element was an *essential* element of the offense. *See id.*

¶10 Here, Houston's sentence was enhanced, as in *Malone*, and involved an irreducible element, as in *Lara*. But, because Malone's sentence was not enhanced by an essential element and because Lara's sentence, although aggravated by an essential element, was not enhanced at all, Houston asserts that *Lara* did not address the specific factual situation in his case—"the use of an irreducible element to *enhance* a sentence"—and therefore does not control. But again, *Bly* is controlling in this case. *See id.*, 171

Ariz. at 285, 830 P.2d at 806. And Houston has not articulated why our analysis of legislative intent would be different in a case enhancing a sentence based on an irreducible element of the offense than in a case aggravating a sentence based on an irreducible element of the offense as in *Lara*. In each instance, the legislature has provided for additional punishment based on an essential element.

¶11 Furthermore, *Lara*'s holding does not differentiate between the facts in *Malone* or *Lara* and makes no distinction between aggravated and enhanced sentences. *See id.* Instead, *Lara* holds that *Orduno* applies only to DUI cases and that all other cases fall under the *Bly* rationale—even those involving an "essential and *irreducible* element" of a crime. *Id.* at 284-85, 830 P.2d at 805-06. In determining that an irreducible element of a non-DUI offense may also be used to enhance the sentence for the crime, the court in *Lara* stated:

> Were we today writing on a clean slate, we might well agree with the *Lara* [intermediate appellate] court's extension of *Orduno*'s rationale [to non-DUI cases]. A healthy respect for *stare decisis*, however, and the frank recognition that *Bly* and similar cases have been relied upon to resolve hundreds, if not thousands, of non-DUI cases in Arizona, leads us to restate what we originally stated in *Orduno*: *Orduno*'s application is limited to DUIs. In reaffirming the rule of *Bly*, we also note that although the legislature has amended section 13-604 many times since *Bly* was decided, it has never modified or overturned the *Bly* rule. This confirms our original conclusion concerning the proper interpretation of the legislative scheme concerning non-DUI felonies.

Id. at 285, 830 P.2d at 806.

¶12 The cases Houston cites in support of his position do not compel a different conclusion. Both *State v. Magana*, 178 Ariz. 416, 419, 874 P.2d 973, 976 (App. 1994) (Weisberg, J., dissenting), and *State v. Paxson*, 203 Ariz. 38, ¶¶ 21-22, 49 P.3d 310, 314-15 (App. 2002), explicitly state that the holding in *Orduno* was limited to DUI cases. Moreover, as Houston concedes, neither case involves the issue presented here—whether, in a non-DUI case, an essential element of a crime may also be used to enhance the sentence for that crime. The cases are therefore inapplicable, and the trial court did not err in sentencing Houston.

¶13 Houston further argues, however, that his enhanced sentence violated his statutory and constitutional rights against double jeopardy and double punishment. He did not raise this issue below, so he has forfeited all but fundamental error review. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Double jeopardy violations, however, are fundamental error, and we review them de novo. *State v. Price*, 218 Ariz. 311, ¶ 4, 183 P.3d 1279, 1281 (App. 2008).

¶14 Houston first claims that his enhanced sentence is double punishment in violation of A.R.S. § 13-116. This statute, however, does not apply to situations of enhanced or aggravated sentences "but was designed to protect a defendant from double punishment when he has been found guilty of two or more crimes all arising from the same fact situation." *State v. Rodriguez*, 126 Ariz. 104, 106-07, 612 P.2d 1067, 1069-70 (App. 1980). Thus, Houston's claim that his sentence violated § 13-116 is without merit.

¶15 He next contends that his enhanced sentence is a double jeopardy violation under both article II, § 10 of the Arizona Constitution and the Fifth Amendment to the United States Constitution. "The state and federal double jeopardy clauses generally provide the same protection to criminal defendants." *State v. Siddle*, 202 Ariz. 512, ¶ 7, 47 P.3d 1150, 1153 (App. 2002). And both constitutions prohibit multiple punishments for the same offense. *Lemke v. Rayes*, 213 Ariz. 232, ¶ 10, 141 P.3d 407, 411 (App. 2006). However, both the Supreme Court of the United States and the Arizona Supreme Court have held that sentence enhancements do not offend double jeopardy because they are simply increased punishment due to the manner in which the crime was committed. *United States v. Watts*, 519 U.S. 148, 154-55 (1997); *Bly*, 127 Ariz. at 371, 621 P.2d at 280. Moreover, in situations where double jeopardy is alleged to result from a single trial, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). Our supreme court made this point in *Bly* as well, stating:

> If the presence of a deadly weapon, as an element of the crime or otherwise, moves the legislature to impose more severe punishment for the offense, we must abide by the legislative determination. The punishment may be severe and it may be a single element of the crime which mandates the legislative decision to make . . . a minimum prison term mandatory, but that does not mean a defendant is being punished time and time again for a single act. It merely defines a single harsh punishment for a single severe crime.

127 Ariz. at 373, 621 P.2d at 282 (internal citations omitted). Although these cases do not specifically address the situation in which the factor used to enhance the sentence was

also an essential element of the crime, Houston has provided no authority suggesting that this distinction is relevant.[6] We are not convinced that current case law prohibits a sentence from being enhanced in this way and, thus, conclude that the enhanced sentence imposed on Houston does not violate the Double Jeopardy Clause of either the Arizona or the United States Constitutions.

¶16 In light of the foregoing, we affirm Houston's convictions and sentences.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

ANN A. SCOTT TIMMER, Judge*

*The Honorable Ann A. Scott Timmer, Chief Judge of Division One of the Arizona Court of Appeals, is authorized to participate in this appeal pursuant to A.R.S. § 12-120(F) (2003).

[6]Houston argues that the court in *Orduno* "expressly left open" the question of double jeopardy. And, in his reply brief, he points out that the *Orduno* court noted that *Bly* and other cases did not involve the use of an essential element to enhance the sentence. However, the fact that the court made this observation and then stated that it need not reach the double jeopardy issue is not a signal that the court would be inclined to distinguish *Bly* on those grounds.