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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ROBERT EDWIN RIOS, Petitioner.	2 CA-CR 2009-0215-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063744

Honorable Stephen C. Villarreal, Judge

REVIEW GRANTED; RELIEF DENIED

Robert Edwin Rios — Florence
In Propria Persona

V Á S Q U E Z, Judge.

¶1 In July 2007, petitioner Robert Rios pled guilty to numerous offenses committed during two home invasions in 2001 and 2004. Count one, sexual assault; count two, sexual abuse; count three, kidnapping; and count four, second-degree burglary, all arose from the 2001 home invasion. And count five, kidnapping; count six, second-degree burglary; and count seven, sexual abuse, related to the home invasion Rios committed in 2004. With respect to the 2001 charges, the trial court sentenced him to presumptive, consecutive prison terms of seven years for sexual assault (count one) and 1.5 years for sexual abuse (count two) and concurrent, presumptive terms of five years for kidnapping (count three) and 3.5 years for burglary (count four). For the 2004 home invasion, the court sentenced him to enhanced, presumptive, consecutive terms of 9.25 years for kidnapping (count five) and 2.25 years for sexual abuse (count seven) and a concurrent term of 6.5 years for burglary (count six). He filed a timely petition for post-conviction relief with the trial court, pursuant to Rule 32.1, Ariz. R. Crim. P. The court summarily denied relief, and Rios filed a petition for review. *See* Ariz. R. Crim. P. 32.9.

¶2 In his petition for review, Rios contends the trial court should have struck the state's response to his petition below as untimely and granted him relief by vacating his sentences and resentencing him. In the alternative, he argues the court erred in dismissing his petition because the court improperly enhanced his sentences for counts five, six, and seven based on a prior felony conviction from New Mexico. He further contends the court abused its discretion in ordering consecutive sentences for counts one, two, five, and seven.

¶3 Rios also seeks to "preserve[additional] issues from his Rule 32" petition, including that there was an insufficient basis for the trial court's finding he had an historical prior felony conviction, that the court erred in admitting evidence of sexual motivation, and that he should have received mitigated sentences.[1] We will not disturb the trial court's ruling absent an abuse of its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

Discussion

¶4 Rios first asserts the trial court should have granted his consolidated "motion for default judgment; motion to preclude," in which he asked the court to strike the state's response to his petition for post-conviction relief because it was filed untimely. The court does not appear to have ruled on the motion explicitly, but it noted in its minute entry that the state's response was filed on a date that would have been timely, and it denied Rios relief. In any event, a trial court has discretion to consider late filings. *State v. Vincent*, 147 Ariz. 6, 8, 708 P.2d 97, 99 (App. 1985) (because court has discretion to extend time for filing motions, court must necessarily have discretion to consider late ones). And Rios has neither argued nor demonstrated that he was prejudiced by the state's allegedly untimely response. We therefore cannot say the court abused its discretion in failing to strike the state's response to Rios's petition for post-conviction relief. *See id.*

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[1]Rios additionally asks this court to review the record for fundamental error. However in post-conviction relief proceedings, a defendant is not entitled to a general fundamental error review of the record, and we therefore deny his request. *See Montgomery v. Sheldon*, 181 Ariz. 256, 260, 889 P.2d 614, 618 (1995).

¶5 Moreover, even had the trial court stricken the state's response as untimely, this would not automatically have entitled Rios to relief. *See State v. Cawley*, 133 Ariz. 27, 29, 648 P.2d 142, 144 (App. 1982). The "confession of error" rule, which Rios invokes, permits a trial court to enter judgment in favor of the moving party when the opposing party has failed to respond and the issues before the court are debatable. *See State ex rel. McDougall v. Superior Court*, 174 Ariz. 450, 452, 850 P.2d 688, 690 (App. 1993). But courts are not required to accept a confession of error, even when made explicitly, "particularly when applicable legal principles do not support it." *Lopez v. Kearney ex rel. County of Pima*, 222 Ariz. 133, ¶ 10, 213 P.3d 282, 285 (App. 2009); *see State v. Sanchez*, 174 Ariz. 44, 45, 846 P.2d 857, 858 (App. 1993). Here, the issues before the court were not debatable, and the court's findings are fully supported by the record and legal authority. Thus, Rios would not have been entitled to relief even had the state implicitly or explicitly confessed error.

¶6 Rios next contends he is entitled to relief under Rule 32.1(a) because his sentences for counts five, six, and seven were enhanced improperly and thus illegal. At sentencing, the trial court found Rios had prior New Mexico felony convictions for tampering with evidence and unlawful imprisonment. He argues that, because he was not convicted of the New Mexico offenses until after he committed the 2004 offenses, they do not qualify as historical prior felony convictions under A.R.S. § 13-105(22) and therefore could not support sentence enhancement pursuant to A.R.S. § 13-703.[2]

[2]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 ease of reference and because the renumbering included no substantive changes, *see* 2008 Ariz. Sess.

¶7 Rios relies on *State v. Thompson*, 198 Ariz. 142, ¶ 23, 7 P.3d 151, 158 (App. 2000), in which another department of this court stated that, "if the defendant was not sentenced on [a] prior offense before committing the present offense, the prior offense is not an historical prior felony conviction" for enhancement purposes. However, our supreme court vacated that decision and concluded that a prior conviction may be used for enhancement as an historical prior felony conviction when the conviction for the prior offense precedes conviction for the later offense. *See State v. Thompson*, 200 Ariz. 439, ¶ 9, 27 P.3d 796, 798 (2001); *see also State v. Thomas*, 219 Ariz. 127, ¶ 9, 194 P.3d 394, 397 (2008). Here, Rios concedes he pled guilty to the New Mexico offenses on February 23, 2004, and was sentenced on May 17 of that year. He pled guilty to the Arizona offenses on July 24, 2007, and was sentenced on November 5. Thus, Rios's New Mexico convictions qualified as historical prior felony convictions.

¶8 Furthermore, Rios's historical prior felony convictions were for tampering with evidence and unlawful imprisonment, which are both class six felonies in Arizona. *See* § 13-703(M) (non-Arizona convictions usable for enhancement if offense constitutes felony in Arizona); A.R.S. §§ 13-1303 (unlawful imprisonment), 13-2809 (tampering with evidence). And Rios filed an affidavit with his petition for post-conviction relief in which he admitted having committed the New Mexico offenses within five years of committing the 2004

Laws, ch. 301, § 119, we refer in this decision to the current section numbers rather than those in effect at the time of the offense in this case.

Because Rios committed these offenses on the same occasion, they constitute only one historical prior felony conviction. *See* § 13-703(L).

offenses. *See* § 13-105(22)(c) (for conviction of class four, five, or six felony to qualify as historical prior felony conviction, defendant must have committed offense within five years of committing current offense). The petition for review contains this same concession. Thus, the trial court did not err in concluding Rios's prior convictions constituted historical prior felony convictions for enhancement purposes.[3]

¶9 Rios also maintains his sentences are illegal because "the court abused its discretion in sentencing [him] to consecutive terms for offenses that . . . overlap their elements." Rios received consecutive sentences for counts one, two, five, and seven. The trial court concluded there was no abuse of discretion at sentencing because the consecutive sentences "were for offenses that did not overlap their elements," and the sentencing judge therefore had discretion to choose between consecutive and concurrent sentences.

¶10 Section 13-116, A.R.S., permits multiple convictions for a single act or omission that is punishable under multiple sections of the law, but it requires that such convictions be served concurrently. To determine whether a defendant has committed a single act requiring concurrent sentences, we apply the analysis in *State v. Gordon*, 161 Ariz. 308, 314-15, 778 P.2d 1204, 1210-11 (1989), which focuses on the elements of the offenses, the facts of the particular criminal transaction, and the harm or harms to the victim to determine whether consecutive sentencing is permissible.

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[3]To the extent Rios also argues there is a conflict between the language defining historical prior felony under § 13-105(22) and A.R.S. § 13-701(D)(11), which lists as an aggravating factor that "the defendant was previously convicted of a felony within the ten years immediately preceding the date of the [instant] offense," we note his sentence was not aggravated pursuant to § 13-701. Its language is therefore irrelevant to the issues before us.

¶11 The offenses at issue all have different elements, such that each may independently be committed without necessarily committing any other. *See* A.R.S. §§ 13-1304 (kidnapping), 13-1404 (sexual abuse), 13-1406 (sexual assault). Counts one and two involved a different victim and a different date from counts five and seven. Furthermore, the facts supporting Rios's conviction for sexual assault in count one were that he digitally penetrated the victim's vulva against her consent. He separately placed his mouth on the victim's breast, providing the basis for count two, sexual abuse. It was therefore possible for Rios to have committed each of these offenses without necessarily committing the other, and each caused a different harm to the victim. *See State v. Boldrey*, 176 Ariz. 378, 382-83, 861 P.2d 663, 667-68 (App. 1993) (consecutive sentences for separate sexual offenses committed as part of single criminal "episode" not violative of § 13-116).

¶12 Similarly, regarding count five, kidnapping, Rios admitted he "accosted [the victim] in the bedroom, made her go to the kitchen and back to the bedroom and into the bathroom. She did not have freedom of movement and was restrained." Rios additionally admitted that he committed sexual abuse, as alleged in count seven, by placing his mouth on the victim's breast. Thus, "[s]ubtracting the facts necessary to convict [Rios] of the sexual offense[], we are left with facts sufficient to satisfy the elements of kidnapping." *State v. Eagle*, 196 Ariz. 27, ¶ 28, 992 P.2d 1122, 1128 (App. 1998). To commit the sexual abuse, it was unnecessary for Rios to force the victim to move variously into the kitchen, the bedroom, and the bathroom. These were additional acts that the sentencing court reasonably could have concluded caused the victim additional harm, supporting its decision to impose

consecutive sentences for kidnapping and sexual abuse. *See id.* ¶ 29. We thus cannot say the trial court abused its discretion in denying relief on that basis.

¶13 Finally, Rios attempts to "preserve[]" a number of issues that he raised below and notes he "did not waive his right to a jury determination of aggravating factors, pursuant to the United States Supreme Court's decision in *Blakely v. Washington*," 542 U.S. 296 (2004). However, Rios has not supported any of these claims with argument, citation to the record, or citation to pertinent authority. He has thus failed to comply with Rule 32.9(c)(1)(iii), (iv), and we reject these additional claims summarily. *See State v. French*, 198 Ariz. 119, ¶ 9, 7 P.3d 128, 131 (App. 2000), *disapproved in part on other grounds by Stewart v. Smith*, 202 Ariz. 446, ¶ 10, 46 P.3d 1067, 1071 (2002).

Disposition

¶14 Although we grant review, we deny relief for the reasons stated above.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge