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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THE STATE OF ARIZONA, Appellee, v. DAMIEN ALEX SANCHEZ, Appellant.	2 CA-CR 2010-0023 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20090107002

Honorable Edgar B. Acuña, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Appellant Damien Sanchez appeals from his convictions for drive-by shooting and endangerment. He maintains the trial court erred in allowing the state to present an accomplice theory at trial, allowing certain testimony that he contends violated his confrontation rights, and instructing the jury on accomplice liability and reasonable doubt.[1] He also challenges the concurrent, presumptive prison terms the court imposed, claiming the court erred when it found certain factors constituted aggravating circumstances. Finding no error, we affirm.

Background

¶2 "We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the jury's verdicts." *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). In 2008, A. was having a New Year's Eve party at his house. Around one o'clock in the morning he went outside after his daughter reported that "the kids across the street were trying to start a fight with [his] son's friends." A. and his wife had gone across the street "to calm everybody down" when Raul Inclan, Sanchez's codefendant and a resident of the house across the street, went into his house and came back outside with a gun.

¶3 Inclan pointed the gun at A. and then pointed it into the air, firing a shot. Inclan and Sanchez, who was driving, got into a car with several others and drove away. A. and his wife went back to their house and tried to move everyone inside. As they were doing so, the car returned and four shots were fired at A.'s house. One of the shots hit

[1]Sanchez also initially argued the trial court had erred in refusing to give the jury a special interrogatory he had requested, but in his reply brief he conceded there had been no error.

A.'s son in the arm. Although Sanchez fled the scene, he turned himself in to police officers a few hours after the incident.

¶4 Sanchez was charged with aggravated assault, drive-by shooting, two counts of endangerment, and criminal damage.[2] A jury found him guilty of the drive-by shooting charge and the two counts of endangerment. The trial court imposed enhanced, presumptive, concurrent prison terms, the longest of which was the 10.5-year term for drive-by shooting. This appeal followed.

Discussion

I. Accomplice liability evidence

¶5 Sanchez first contends that by granting the state's motion to allow it to proceed at trial under an accomplice theory, the court deprived him of his constitutional right to notice of the charges against him. Shortly before trial, the state moved in limine to "notice[] the Court that it intend[ed] to proceed on the theories of principal and accomplice liability." Sanchez objected to the motion, arguing that because the state had not presented an accomplice theory to the grand jury and had not cited any accomplice liability statutes in the indictment, he had not received sufficient notice of the charges against him. After a hearing on the motion on the first day of trial, the court granted the state's motion, ruling that the state was not "required to charge a defendant as an accomplice [in] the indictment in order to receive a jury instruction on accomplice

[2]Sanchez was also charged with possession of a deadly weapon by a prohibited possessor, but that charge was severed from the others.

liability" and that "there [wa]s no lack of notice of accomplice liability since there [are] often alternative ways in which the State can prove its case." We agree.

¶6 In *State v. McInelly*, 146 Ariz. 161, 162-63, 704 P.2d 291, 292-93 (App. 1985), this court rejected the defendant's argument that the trial court had erred when it instructed the jury on accomplice liability because the indictment had charged him only as a principal. This court concluded "[t]here is no requirement that the indictment charge appellant as an accomplice in order to permit a jury instruction to that effect." *Id*. at 162, 704 P.2d at 292. It follows that the state can proceed under an accomplice theory at trial without including a reference to accomplice liability in the indictment. "[B]eing an accomplice is not a separately chargeable offense[, but rather] merely a theory that the state may utilize to establish the commission of a substantive criminal offense." *State v. Woods*, 168 Ariz. 543, 544, 815 P.2d 912, 913 (App. 1991); *see also State v. Garcia*, 176 Ariz. 231, 234, 860 P.2d 498, 501 (App. 1993). And, a defendant is "not entitled to notice of the precise method of proving th[e] charges" against them. *McInelly*, 146 Ariz. at 163, 704 P.2d at 293. Thus, the state was not required to charge Sanchez as an accomplice in order to pursue that theory at trial and the trial court correctly granted its motion.

II. Jury instruction on accomplice liability

¶7 Sanchez next maintains that A.R.S. § 13-303(B), and the trial court's jury instruction on accomplice liability, relieved the state of its burden to prove all of the elements of the underlying offense and thereby violated his right to due process. Although Sanchez objected to the accomplice instruction in the trial court, he did not do

so on the ground he is asserting on appeal. "[A]n objection on one ground does not preserve the issue on another ground." *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682 683 (App. 2008). Consequently, we review this issue for fundamental error. S*ee State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Sanchez argues the error here was both fundamental and prejudicial.

¶8 Relying on *In Re Winship*, 397 U.S. 358 (1970), and *Neder v. United States*, 527 U.S. 1 (1999), Sanchez argues that in order to find a defendant guilty of a charged offense, the jury must find "proof beyond a reasonable doubt of every fact or element necessary to constitute the . . . crime." Although this is a correct statement of the law, Sanchez's reliance on these cases in this context is misplaced. In *Winship*, the court addressed the "single, narrow question whether proof beyond a reasonable doubt" was "required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult." 397 U.S. at 359. In *Neder*, the issue was whether harmless error review would be employed when a trial court had omitted an element of an offense from its instruction. 527 U.S. at 12-15. Although these cases demonstrate that the state must prove each element of an offense beyond a reasonable doubt, they do not stand for the proposition that due process prohibits a state from establishing a defendant's culpability under a theory of accomplice liability.

¶9 Sanchez does not allege that the trial court omitted any element of the charged offenses from its instructions on the charged offenses themselves, but rather he contends that the instruction the court gave on accomplice liability, which is based on the statute, relieved the state of its obligation to prove the elements of the charged offenses,

thereby violating his due process rights. But neither the statute nor the instruction the court gave here relieved the state of that duty. The jury was instructed, "A defendant need not act out each element of the charged offense. The acts of one accomplice are imputed to all." Thus, if the state establishes a defendant's liability as an accomplice, acts that constitute elements of the underlying, charged offense are imputed to the defendant and in this way the state is able to prove the defendant committed the charged offense. We see no error here, much less error that can be characterized as fundamental.

III. Confrontation clause

¶10 Sanchez also argues the trial court violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution and article II, § 24 of the Arizona Constitution by allowing the state to impeach the testimony of its own witnesses with their prior inconsistent statements. We review de novo whether the admission of evidence violates the Confrontation Clause. *State v. Bronson*, 204 Ariz. 321, ¶ 14, 63 P.3d 1058, 1061 (App. 2003).[3] And, as the state points out, although Sanchez claims a violation of his rights under the Arizona Constitution, he does not make a separate argument on that claim. "We therefore address his claim only under the United States Constitution." *State v. Dean*, 206 Ariz. 158, n.1, 76 P.3d 429, 432 n.1 (2003).

[3]The state argues we should review solely for fundamental error. Although the state is correct that "an objection on one ground does not preserve the issue on another ground," Sanchez did object below on the ground of confrontation, albeit making a slightly different argument.

¶11 At trial, Joseph Guerrero, a passenger in the car at the time of the shooting, testified he did not remember what had happened because he had been drinking. The prosecutor asked him if he remembered "telling the police anything that happened" and he said he did not. Likewise, Richard Federico, who had also been in the car, testified that he did not remember telling police Sanchez had shot a gun out the window of the car.

¶12 After Guerrero and Federico testified, the court heard argument as to whether statements they had made to the police on the night of the shooting could be admitted to impeach their testimony. The court ruled that the witnesses' testimony had been inconsistent with their statements to police[4] and allowed the state to present evidence of their prior statements. Two police detectives testified about the statements Guerrero and Federico had made on the night of the shooting and about how each had essentially told police Sanchez had fired shots. Sanchez did not ask to recall either Guerrero or Federico for re-cross examination.

¶13 Sanchez argues that Guerrero and Federico became his "accusers for purposes of confrontation" at the time their statements to police were admitted and that "[a]t that point" he "should have had the right to confront [them] and specifically cross examine them about their statements." To the extent we understand his argument, Sanchez apparently maintains that if evidence is admitted for impeachment, the declarant must be available, and indeed produced by the trial court, at the moment the evidence is

[4]Sanchez does not argue on appeal that this ruling was erroneous and has therefore waived any argument on that point. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

admitted in order not to violate a defendant's confrontation rights. Sanchez cites no authority to support such a proposition. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi).

¶14 Rather, as this court has ruled, citing *Crawford v. Washington*, 541 U.S. 36 (2004), "[t]he Confrontation Clause prohibits the use of a testimonial pre-trial statement in lieu of testimony from a witness unless there was prior opportunity to cross-examine the witness. It does not preclude using a prior statement to impeach a witness or refresh the witness's memory." *State v. Salazar*, 216 Ariz. 316, ¶ 7, 166 P.3d 107, 109 (App. 2007). Thus, Sanchez's confrontation rights were not violated by the admission of the evidence. And, nothing in the record suggests he was prohibited from confronting the witnesses, both of whom had been present at trial[5] and could have been recalled for further testimony had Sanchez made such a request. Whether "through inadvertence or strategy," Sanchez did not move to recross-examine the witnesses after the statements had been introduced, and his failure to do so "waived his right to cross-examine [them]." *United States v. Darrell*, 828 F.2d 644, 650 (10th Cir. 1987); *cf. State v. Real*, 214 Ariz. 232, ¶ 10, 150 P.3d 805, 808 (App. 2007) (Confrontation Clause protects only "opportunity of cross-examination" and "does not guarantee that . . . cross-examination will be effective."). Thus, no violation of Sanchez's rights under the Confrontation Clause occurred.

IV. Reasonable doubt instruction

¶15 Sanchez also contends the trial court erred in instructing the jury on reasonable doubt as directed by our supreme court in *State v. Portillo*, 182 Ariz. 592, 898

[5]Sanchez cross-examined Guerrero, but declined to cross-examine Federico.

P.2d 970 (1995). That court repeatedly has rejected similar challenges. *See, e.g., State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Roseberry*, 210 Ariz. 360, ¶ 55, 111 P.3d 402, 411-12 (2005); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003). We are bound to follow our supreme court's decisions, *State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003), and therefore reject this claim.

V. Sentencing

¶16 Finally Sanchez maintains the trial court "erred at sentencing because it either improperly found in aggravation facts not found by the jury . . . or improperly used the same basic facts related to the dangerous nature finding entered by the jury and already used to enhance [his] sentence, in its sentencing . . . consideration." Because Sanchez did not object below, we review solely for fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. However, the imposition of an illegal sentence constitutes fundamental error. *State v. Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d 263, 266 (App. 2007).

¶17 "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). "Under Arizona's noncapital sentencing statutes, the maximum punishment authorized by a jury verdict alone, without the finding of any additional facts, is the presumptive term." *State v. Johnson*, 210 Ariz. 438, ¶ 10, 111 P.3d 1038, 1041 (App. 2005). Thus, even if a trial court considers an aggravating factor not found by a jury, it does not violate the

requirements of *Apprendi* and *Blakely v. Washington*, 542 U.S. 296 (2004), so long as it imposes a presumptive term. *See Johnson*, 210 Ariz. 438, ¶ 10, 111 P.3d at 1041. The trial court here imposed presumptive terms and therefore did not commit error based on *Blakely*.

¶18 Likewise, we reject Sanchez's argument that the trial court erred in considering Sanchez's "dangerousness . . . to the community." According to Sanchez, in considering that factor in aggravation, the court used an element of the charged offense to aggravate his sentence when "the legislature ha[d] [not] specified that it may be so used." *State v. Tschilar*, 200 Ariz. 427, ¶ 33, 27 P.3d 331, 339 (App. 2001). But, a finding that a defendant is a danger to the community is not the same as a finding that the defendant committed a dangerous offense.

¶19 Section 13-105(13), A.R.S., defines a "[d]angerous offense" as "an offense involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person." And, both the infliction of serious physical injury and the use or threatened use of a deadly weapon or dangerous instrument are enumerated aggravating factors under A.R.S. § 13-701(D). A finding that a defendant is a danger to the community, however, is not an enumerated aggravating factor and is considered only under the "catch-all" provision, § 13-701(D)(24). *State v. Price*, 217 Ariz. 182, ¶ 4, 171 P.3d 1223, 1225 (2007). Thus, the trial court did not consider an element of the charged offense as an aggravating factor in determining Sanchez's sentence and Sanchez has failed to show fundamental error occurred. *See Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d at 608.

Disposition

¶20 Sanchez's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge