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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OF ARIZONA, Appellee, v. JOSE ALFREDO JIMENEZ-BRACAMONTE, Appellant.	2 CA-CR 2008-0125 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20073875

Honorable John S. Leonardo, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

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B R A M M E R, Judge.

¶1 Appellant Jose Jimenez-Bracamonte appeals his convictions for transportation of marijuana for sale and possession of drug paraphernalia. He argues there was insufficient evidence to support his convictions and the trial court erred in instructing the jury on the credibility of witnesses and reasonable doubt. He further contends the court erred in ordering his sentence of imprisonment as "flat-time." We affirm Jimenez-Bracamonte's convictions but vacate his sentence for transportation of marijuana for sale and remand the case for resentencing on that charge.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *See State v. Hamblin*, 217 Ariz. 481, ¶ 2, 176 P.3d 49, 50 (App. 2008). On the evening of October 2, 2007, Jimenez-Bracamonte transported through the desert a large quantity of marijuana for sale. That evening, United States Border Patrol agent Enrique Nuno, by using a thermal imaging and radar system, detected a group of eleven people walking through the desert near the Mexican border. One member of the group appeared to be guiding the others, who followed in a straight line while carrying large backpacks.

¶3 Upon Nuno's request, United States Customs and Border Protection agent and helicopter pilot Brian Averyt flew to the group's location and saw the group with several bales of marijuana. When additional border patrol agents arrived on the scene, the group abandoned the marijuana, fleeing in different directions. Averyt followed, shining the

helicopter's spotlight on one of the group's members, Jimenez-Bracamonte, until agents arrested him.

¶4 Agents found at the location identified by Nuno and Averyt a total of 551.2 pounds of marijuana, which had been separated into ten bundles wrapped in cellophane and plastic and placed in burlap sacks fashioned into backpacks. At the time of his arrest, Jimenez-Bracamonte had red marks on his shoulders and burlap fibers on his clothes from the backpacks.

¶5 A grand jury charged Jimenez-Bracamonte with transportation of marijuana for sale and possession of drug paraphernalia. After a two-day trial, the jury found Jimenez-Bracamonte guilty of both counts and found the marijuana he had transported weighed at least two pounds. The trial court sentenced Jimenez-Bracamonte to concurrent, presumptive prison terms and directed that the longer of the two—a five-year term for transportation of marijuana for sale—was "to be served day for day pursuant to the law." This appeal followed.

Discussion

Sufficiency of the evidence

¶6 Jimenez-Bracamonte first contends the court erred in denying his motion for judgment of acquittal because there was insufficient evidence to support his convictions of transportation of marijuana for sale and possession of drug paraphernalia. A judgment of acquittal is appropriate only when "there is no substantial evidence to warrant a conviction."

Ariz. R. Crim. P. 20(a). Evidence may be direct or circumstantial, but if reasonable minds can differ on inferences to be drawn therefrom, the evidence must be considered substantial and the case submitted to the jury. *See State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004); *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). On appeal, we review the denial of a motion for a judgment of acquittal for an abuse of the trial court's discretion and will only reverse if there are no probative facts to support the conviction. *See State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007). That is, we will reverse only if it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶7 At trial, Nuno testified he had observed through his equipment a group of eleven people walking near the border, ten of whom were carrying large backpacks. He further testified his equipment had not detected any other people in the area that evening. Averyt testified that, upon arriving by helicopter at the location Nuno had identified, he saw the same group of eleven people and was able to conclude, based on his experience, that the group's backpacks contained marijuana. When the group members began to flee, Averyt "pick[ed] out . . . the person who ha[d] the most reflective clothing . . . and stay[ed] with that person" using the helicopter's spotlight. Averyt stated he never lost sight of that person until he was arrested by Border Patrol agent Luke Anderson. Anderson testified the person he had arrested, and who Averyt's spotlight had tracked, was Jimenez-Bracamonte. Another agent

testified he had found at the crime scene shoeprints that matched the shoes Jimenez-Bracamonte had been wearing and ten bundles of marijuana contained in burlap sacks fashioned into backpacks. Anderson also noted Jimenez-Bracamonte had "pretty bright red" "rubbing marks" on his shoulders and burlap fibers on his clothes at the time of his arrest. Jimenez-Bracamonte and the state had stipulated before trial that the "bales/backpacks discovered by Border Patrol" contained 551.2 pounds of marijuana, which was being transported for sale.

¶8 Jimenez-Bracamonte nonetheless asserts this evidence was insufficient to sustain his convictions because Nuno and Averyt admitted at trial that they had not seen any of the traffickers' faces. And, because Nuno testified "his equipment would not have been able to detect the presence of someone who was already in the [area] resting at the time he began his surveillance," the agents had no way of knowing whether Jimenez-Bracamonte "ha[d] been in the [area] before the group of backpackers arrived." Jimenez-Bracamonte further reasons the red marks Anderson saw on his shoulders "could have been caused by a backpack containing something other than marijuana, such as [his] belongings." Jimenez-Bracamonte also points to a codefendant's testimony that he had not been part of the group transporting the marijuana. Jimenez-Bracamonte concludes this evidence suggests he was merely present in the area where the marijuana was found, a fact insufficient to support his convictions. *See State v. Hunt*, 91 Ariz. 149, 153, 370 P.2d 642, 645 (1962); *State v. Teagle*, 217 Ariz. 17, ¶ 41, 170 P.3d 266, 276 (App. 2007).

¶9 But, as we noted above, to withstand a motion for a directed verdict, the evidence presented at trial need only permit a reasonable jury to infer a defendant's guilt, not conclusively establish guilt. *See Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d at 477; *Landrigan*, 176 Ariz. at 4, 859 P.2d at 114. Based on the agents' testimony regarding the circumstances of Jimenez-Bracamonte's arrest near backpacks he concedes contained large quantities of marijuana for sale, a reasonable jury could have concluded he was a member of the group first observed by Nuno, knowingly transported marijuana for sale, and possessed drug paraphernalia. *See State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005) ("The substantial evidence required for conviction may be . . . circumstantial."); *see* A.R.S. § 13-3405(A)(4) and (B)(11); A.R.S. § 13-3415(A). That other inferences may just as reasonably be drawn from the evidence or that conflicting evidence may exist does not mean a Rule 20 motion should be granted, rather such issues are for the jury, as the trier of fact, to resolve after weighing the evidence and assessing the witnesses' credibility. *See State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004). We do not reweigh the evidence on appeal. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Based on the evidence presented at trial, as well as the facts to which Jimenez-Bracamonte and the state stipulated, there was sufficient evidence to support the jury's conclusion that Jimenez-Bracamonte had transported more than two pounds of marijuana for sale and had possessed drug paraphernalia.

Reasonable doubt instruction

¶10 Jimenez-Bracamonte argues the reasonable doubt instruction the trial court gave pursuant to *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), improperly "relieved the state of its constitutional burden of proof." Our supreme court repeatedly has rejected similar challenges to the instruction the court in *Portillo* directed trial courts to give. *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. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003); *State v. Cañez*, 202 Ariz. 133, ¶ 76, 42 P.3d 564, 587 (2002); *State v. Van Adams*, 194 Ariz. 408, ¶¶ 29-30, 984 P.2d 16, 25-26 (1999). We are bound to follow our supreme court's decisions. *See State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003). Jimenez-Bracamonte, in fact, concedes our supreme court has rejected similar arguments and notes he merely "present[ed] this issue in order to preserve it in the hope that better reasoning will one day prevail." We, therefore, do not address this argument further.

Witness credibility instruction

¶11 Jimenez-Bracamonte next asserts the trial court structurally or, at a minimum, fundamentally, prejudicially erred in instructing the jury that:

> The number of witnesses testifying on one side or the other is not alone the test of a witness's credibility or of the weight of the evidence. If warranted by the evidence, you may believe one witness against a number of witnesses testifying

> differently. The tests are, how truthful is a witness and how convincing is his or her evidence and which witness and which evidence appears to you to be most accurate and otherwise trustworthy in light of all the evidence and circumstances shown.

¶12 Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to [the] defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. Structural error, in contrast, is error that "'affect[s] the entire conduct of the trial from beginning to end'" and "'deprive[s] defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for guilt or innocence.'" *State v. Tucker*, 215 Ariz. 298, ¶ 66, 160 P.3d 177, 195 (2007), *quoting Henderson*, 210 Ariz. 561, ¶ 12, 115 P.3d at 605 (alterations in *Tucker*). Such error is "subject to automatic reversal." *State v. LeNoble*, 216 Ariz. 180, ¶ 19, 164 P.3d 686, 690 (App. 2007). To show either fundamental or structural error, a defendant must first prove error. *See Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608; *State v. Hoover*, 195 Ariz. 186, ¶¶ 13-14, 986 P.2d 219, 221 (App. 1998).

¶13 Jimenez-Bracamonte first contends the trial court either fundamentally or structurally erred by instructing the jury as it did because the first sentence of the court's instruction improperly "conveyed that the number of witnesses on each side was . . . a

significant test of a witness's credibility and a major factor in calculating the weight of the evidence," which is "utterly unfounded in the law." He asserts the instruction relieved the state of its "burden of proving every element beyond a reasonable doubt" and "dilut[ed] his due process right to the presumption of innocence." We review a trial court's decision to give a particular instruction for an abuse of discretion, *State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003), but we review de novo whether jury instructions properly state the law. *See State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). In making the latter determination, we review the instructions the trial court gave as a whole. *See State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007).

¶14 Even if the first sentence of the instruction was, in itself, an incorrect statement of the law as Jimenez-Bracamonte claims, we accept neither his contention that it shifted the burden of proof, nor his suggestion that it compromised the jury instructions as a whole. *See id.* Following the sentence to which Jimenez-Bracamonte objects, the jurors were instructed that "if warranted by the evidence, [they could] believe one witness against a number of witnesses testifying differently" and in assessing witness credibility they should consider "how truthful is a witness and how convincing is his or her evidence and which witness and which evidence appears to you to be most accurate and otherwise trustworthy in light of all the evidence and circumstances shown." Moreover, the trial court gave the contested instructions after it told the jury that "[t]he state has the burden of proving the defendant guilty beyond a reasonable doubt." The court had also instructed the jury to "consider all of the

instructions," to "start with the presumption that the defendant is innocent," and to not "conclude that the defendant is likely to be guilty because of his[] choices" in testifying or calling witnesses. Viewed in their entirety, the jury instructions adequately reflected the law and made clear that the state was required to prove Jimenez-Bracamonte guilty beyond a reasonable doubt. *See id.* We presume the jurors followed these instructions. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006).

¶15 Jimenez-Bracamonte next argues that, because the state called five witnesses and he only called one, the instruction "told the jury . . . the weight of the evidence favored the State," an improper comment on the evidence in violation of article VI, § 27 of the Arizona Constitution. A court improperly comments on the evidence when it "express[es] an opinion as to what the evidence proves" or otherwise "interfere[s] with the jury's independent evaluation of that evidence." *State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998). As is evident from our discussion of the court's instruction, however, the trial court in no way opined on the weight of the evidence, instead leaving that determination entirely to the jury. We, therefore, find no error, much less fundamental or structural error, in the court's instruction. *See Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608; *Hoover*, 195 Ariz. 186, ¶¶ 13-14, 986 P.2d at 221.

"Flat-time" sentence

¶16 Last, Jimenez-Bracamonte contends the trial court erred in directing that he serve his five-year term of imprisonment for transportation of marijuana for sale "day for

day," that is, as "flat-time." Whether a trial court correctly interpreted and applied the sentencing statutes is a question of law, which we review de novo. *See State v. Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d 263, 266 (App. 2007). "In any case involving statutory interpretation we begin with the text of the statute," which is "the best and most reliable index of a statute's meaning." *State v. Christian*, 205 Ariz. 64, ¶ 6, 66 P.3d 1241, 1243 (2003). If "'a statute is ambiguous or unclear, however, we attempt to determine legislative intent by interpreting the statutory scheme as a whole and consider the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose.'" *State v. Ross*, 214 Ariz. 280, ¶ 22, 151 P.3d 1261, 1264 (App. 2007), *quoting Hughes v. Jorgenson*, 203 Ariz. 71, ¶ 11, 50 P.3d 821, 823 (2002). When a trial court fails to impose a sentence in conformity with our sentencing statutes, the resulting sentence is illegal. *See State v. Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d 437, 441 (App. 2002). Because Jimenez-Bracamonte did not raise this issue below, we review it only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. But, "[a]n illegal sentence constitutes fundamental error." *Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d at 441.

¶17 Jimemez-Bracamonte was convicted of transporting more than two pounds of marijuana for sale in violation of A.R.S. § 13-3405(A)(4) and (B)(11), a class two felony. Section 13-3405(C) directs that one convicted of violating those provisions "is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the person has served the sentence imposed by the court, the person is eligible for release

pursuant to [A.R.S.] § 41-1604.07 or the sentence is commuted." Section 41-1604.07(A), in turn, states that "each prisoner . . . shall be allowed an earned release credit of one day for every six days served . . . except for those prisoners who are sentenced to serve the full term of imprisonment imposed by the court." The trial court sentenced Jimenez-Bracamonte pursuant to former A.R.S. § 13-701(C)(1),[1] which provides for a presumptive five-year term of imprisonment for a first-offense class two felony conviction. That statute is silent regarding whether the term of imprisonment may or shall be imposed as "flat-time." *See id.*

¶18 The state argues the use of the word "or" in § 13-3405(C) allows the trial court to choose the terms of the defendant's release, that is, choose whether a defendant will serve his term of imprisonment in its entirety or, instead, is eligible for earned release credits. Thus, the state reasons, by sentencing Jimenez-Bracamonte to a "flat-time" term, the court made him ineligible for earned release credits under § 41-1604.07. Jimenez-Bracamonte insists, however, that neither § 13-3405(C) nor § 13-701(C)(1) permits a trial court to impose a "flat-time" term of imprisonment because neither contains the language the legislature has used in other sentencing statutes to authorize a flat-time sentence or preclude a defendant from earning earned release credits pursuant to § 41-1604.07. Because neither statute explicitly authorizes or mandates the trial court to impose a flat-time prison term, Jimenez-Bracamonte reasons, the language in § 13-3405(C) on which the state relies is merely intended to

[1]Section 13-701(C)(1) has since been amended and renumbered as A.R.S. § 13-702(D). *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 23, 24. For ease of discussion, we refer to the version of § 13-701 applicable at the time Jimenez-Bracamonte was sentenced.

"provide[] guidance to the Executive Branch as to when release is possible"—when either (1) the entire sentence imposed is served, (2) the defendant is eligible for early release due to earned release credits, or (3) the sentence is commuted, whichever occurs first. For the following reasons, we agree with Jimenez-Bracamonte.

¶19 "[A] trial court's sentencing authority is derived from the legislative mandates regarding sentencing." *State v. Vargas-Burgos*, 162 Ariz. 325, 326, 783 P.2d 264, 265 (App. 1989). Those mandates "distribute[] the authority to control the sentence so that the court, the department of corrections and the parole board each serve its purpose, and within its specified sphere of competence, individualizes the sentence." *State v. Harris*, 133 Ariz. 30, 31, 648 P.2d 145, 146 (App. 1982). Accordingly, a trial court may impose a sentence "only as authorized by statute and within the limits set down by the legislature." *Id.*

¶20 With these principles in mind, our supreme court in *In re Webb*, 150 Ariz. 293, 723 P.2d 642 (1986), addressed an issue similar to the one raised here. In *Webb*, the defendant had been convicted of misdemeanor criminal trespass in violation of A.R.S. § 13-1504. *Webb*, 150 Ariz. at 293, 723 P.2d at 642. The trial court sentenced the defendant to a six-month jail term pursuant to A.R.S. § 13-707, and ordered that the sentence be served as flat-time. *Webb*, 150 Ariz. at 293-94, 723 P.2d at 642-43. The defendant argued the court had exceeded its authority in imposing a flat-time term and that he was eligible for earned release credits pursuant to A.R.S. § 31-144, governing earned release credits for prisoners in city and county jails. Neither § 13-1504 nor § 13-707, however, explicitly authorized or

mandated the trial court to impose flat time. *Webb*, 150 Ariz. at 294, 723 P.2d at 643; *see* 2008 Ariz. Sess. Laws, ch. 301, § 31. The state, nonetheless, insisted the court could, in its discretion, impose a flat-time jail term, reasoning that, because § 31-144 stated it did not apply "in cases in which a specific release date is set forth," the court's imposition of flat time rendered the defendant ineligible for earned release credits. *Webb*, 150 Ariz. at 294, 723 P.2d at 643. Citing *Harris*, the supreme court reasoned that, absent specific language to the contrary in applicable sentencing statutes, "[w]hether . . . a prisoner is eligible for . . . absolute discharge [based on earned release credits] is not for the courts to decide; it is within the control of the . . . department of corrections." *Webb*, 150 Ariz. at 294, 723 P.2d at 643; *see Harris*, 133 Ariz. at 31, 648 P.2d at 146. The supreme court concluded that "'[f]lat' time sentences are not permitted in misdemeanor cases unless specifically authorized per statute," and determined the sentence imposed in that case was, therefore, illegal. *Webb*, 150 Ariz. at 294, 723 P.2d at 643.

¶21 Relying on *State v. Hasson*, 217 Ariz. 559, 177 P.3d 301 (App. 2008), and *State v. Estrada*, 210 Ariz. 111, 108 P.3d 261 (App. 2005), the state insists that, unlike the statutes at issue in *Webb*, § 13-3405(C) explicitly authorizes trial courts to impose flat-time prison terms. The state's reliance on those cases is misplaced. In *Hasson*, the defendant had been convicted of transportation of methamphetamine for sale in violation of A.R.S. § 13-3407(A)(7) and sentenced to a flat-time, thirteen-year term of imprisonment. 217 Ariz. 559, ¶ 2, 177 P.3d at 302. The defendant argued the trial court erred in imposing a flat-time

term because § 13-3407(F), like § 13-3405(C), states that a person convicted under that statute "'is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the person has served the sentence imposed by the court, the person is eligible for release pursuant to section 41-1604.07 or the sentence is commuted.'" *Hasson*, 217 Ariz. 559, ¶ 3, 177 P.3d at 302, *quoting* § 13-3407(F). Despite that language, Division One of this court upheld the flat-time prison term because § 13-3407(E) directed that the defendant be sentenced pursuant to former A.R.S. § 13-712, which mandated that the defendant serve a term of "calendar years."[2] *Hasson*, 217 Ariz. 559, ¶ 3, n.3, 177 P.3d at 302, 302 n.3. ("calendar years" same as "flat time"); *see* 2005 Ariz. Sess. Laws, ch. 327, § 3; 2008 Ariz. Sess. Laws, ch. 301, § 72. Thus, the court reasoned, *Webb* was distinguishable because § 13-712 explicitly granted the trial court authority to impose a flat-time term. *Hasson*, 217 Ariz. 559, ¶ 16, 177 P.3d at 305. That, of course, is not the case here—the comparable statute under which Jimenez-Bracamonte was sentenced, § 13-701(C)(1), contains no such language. Contrary to the state's assertion, therefore, *Hasson* suggests the language of § 13-3405(C) alone would not authorize imposition of a flat-time term of imprisonment.

¶22 The state's reliance on *Estrada* is also misplaced. In that case, the defendant had been convicted and sentenced pursuant to former A.R.S. § 13-604(C) and A.R.S. § 13-604.02(B), which contained the same relevant language as the statutes under which

[2]Section 13-712 has since been amended and renumbered as A.R.S. § 13-709.03. *See* 2008 Ariz. Sess. Laws., ch. 301, §§ 34, 36. Section 13-3407(E) now refers to § 13-709.03.

Jimenez-Bracamonte was sentenced. *Estrada*, 210 Ariz. 111, ¶ 9, 108 P.3d at 263; *see* 1999 Ariz. Sess. Laws., ch. 261, §§ 5, 7. On appeal, Division One noted in passing that the defendant's convictions exposed him to mandatory, flat-time terms of imprisonment ranging from 3.75 to twelve years. *Estrada*, 210 Ariz. 111, ¶ 9, 108 P.3d at 263. As Jimenez-Bracamonte notes, however, the court's statement was dicta. *See id.* Division One did not consider on appeal whether a flat-time sentence was proper but, rather, whether the trial court had aggravated the defendant's sentence in violation of *Blakely v. Washington*, 542 U.S. 296 (2004). *Estrada*, 210 Ariz. 111, ¶ 10, 108 P.3d at 263. Moreover, the court's statement appears to be incorrect because even if, as the state contends, the contested language at issue here and mirrored in § 13-604.02(B) grants trial courts the discretion to impose flat-time sentences, it clearly does not mandate such a sentence. *See* § 13-3405(C).

¶23 And, Division One of this court has in other cases reached conclusions inconsistent with the language from *Estrada* on which the state relies. In *State v. Nguyen*, 185 Ariz. 151, 152, 912 P.2d 1380, 1381 (App. 1996), Division One considered whether a defendant sentenced to a flat-time prison term of 5.25 years was eligible for a disproportionality review pursuant to Rule 32.9(c), Ariz. R. Crim. P. The court compared the mandatory flat-time term the defendant had received to the sentence he would have received had he been sentenced after the relevant sentencing statutes, § 13-701(C)(1) and A.R.S. § 13-3408(D), had been amended. *Nguyen*, 185 Ariz. at 153, 912 P.2d at 1382. The court concluded that had the defendant been sentenced under the amended statutes, whose operative

language is identical to the statutes pursuant to which Jimenez-Bracamonte was sentenced, the defendant "would have been eligible for earned release credits." *Id.* at 153, 912 P.2d at 1382; *see* 1993 Ariz. Sess. Laws, ch. 255, §§ 10, 44.

¶24 We find further support for Jimenez-Bracamonte's position in other sentencing statutes. As Jimenez-Bracamonte notes, our legislature "knows how to authorize a flat-time sentence" and "how to preclude [the Department of Corrections] from granting earned release credits under § 41-1604.07," and has explicitly done so in other statutes. *See, e.g.*, A.R.S. § 13-707 (trial court "may direct" that defendant "shall not be released on any basis until the sentence imposed by the court has been served"); A.R.S. § 13-709.02(A) (mandating term of "calendar years" for terrorism conviction); A.R.S. § 13-708(A) (person convicted of dangerous felony while on release not eligible for release "on any basis until the sentence imposed is served"); *see also Ross*, 214 Ariz. 280, ¶ 22, 151 P.3d at 1264 (we interpret statutes consistent with "the statutory scheme as a whole"). We last note we have found no Arizona cases in which a trial court has sentenced a defendant to a flat-time term absent such explicit statutory authority and based solely on language like that in § 13-3405(C). In the absence of such express language, we decline to interpret § 13-3405(C) as empowering a trial court to impose a flat-time prison term. *See Webb*, 150 Ariz. at 294, 723 P.2d at 643.

¶25 Because neither § 13-3405(C) nor § 13-701(C)(1) specifically empower the trial court to impose a flat-time sentence, the trial court exceeded its authority in doing so. As we previously noted, "[a]n illegal sentence constitutes fundamental error." *Cox*, 201 Ariz. 464,

¶ 13, 37 P.3d at 441. And, because Jimenez-Bracamonte might have been eligible for release after approximately 4.25 years had the court not improperly sentenced him to flat time, the error prejudiced him. *See* § 41-1604.07; *State v. Griffin*, 154 Ariz. 483, 484-86, 744 P.2d 10, 11-13 (1987) (illustrating difference between flat-time and traditional sentence with possibility of earned release credits); *see also Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607; *cf. State v. McCurdy*, 216 Ariz. 567, n.7, 169 P.3d 931, 938 n.7 (App. 2007) (improperly enhanced sentence prejudicial). Accordingly, we remand the case to the trial court for resentencing.

Disposition

¶26 For the foregoing reasons, we affirm Jimenez-Bracamonte's convictions, but remand the case to the trial court for resentencing consistent with this decision.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge