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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. RONNIE HURSEY, SR., Appellant.	)	2 CA-CR 2008-0191 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200602093

Honorable Janna L. Vanderpool, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Ronnie Hursey, Sr. was charged by indictment with armed robbery and aggravated assault, both alleged as dangerous offenses committed in December 2006.

The state also alleged Hursey had five historical prior felony convictions in Pinal County and, later, filed a separate pretrial allegation of aggravating circumstances that included those convictions and numerous other factors. Before trial, the court granted the state's motion to dismiss the armed robbery charge without prejudice. A jury found Hursey guilty of aggravated assault with a deadly weapon or dangerous instrument, a class three felony and dangerous-nature offense. Before the jury was discharged, Hursey admitted three aggravating factors, including one prior felony conviction. At sentencing, after finding Hursey had two historical prior felony convictions, the court imposed an enhanced, slightly aggravated, twelve-year term of imprisonment. This appeal followed.

¶2 "We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the conviction." *State v. Ramsey*, 211 Ariz. 529, ¶ 2, 124 P.3d 756, 759 (App. 2005). While attempting to leave a retail store with a computer for which they had not paid, Hursey and his brother were confronted by store employees J. and D. When D. attempted to detain the men, a physical confrontation ensued, during which Hursey struck D. Hursey and his brother then left the store, followed closely by D. and J. D. intended to try again to physically apprehend Hursey but, just outside the store, Hursey "pulled a knife, turned around and told [D. and J.] that he was going to cut [them] up."

¶3 Fearing for his own and others' safety, D. yelled "knife," and he and J. "backed off," allowing Hursey and his brother to walk or run through the parking lot to their car. D. and J. "followed from what [D.] felt was a safe distance" and saw the two suspects get into

their vehicle. Before they drove away, D. kicked out the red lens over one of the car's taillights in hopes of making the car easier for law enforcement officers to locate.

¶4 In the first of three issues raised on appeal, Hursey contends the state presented insufficient evidence to support the jury's finding that the aggravated assault was a dangerous offense for purposes of former A.R.S. § 13-604.[1] *See* 2005 Ariz. Sess. Laws, ch. 188, § 1. In evaluating such a claim, we review the record "to determine whether substantial evidence supports the jury's finding." *State v. Roque*, 213 Ariz. 193, ¶ 93, 141 P.3d 368, 393 (2006). "'Substantial evidence is more than a mere scintilla and is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Roseberry*, 210 Ariz. 360, ¶ 45, 111 P.3d 402, 411 (2005), *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990).

¶5 Section 13-604(P) defined a dangerous-nature felony as one "involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another." It is well established that a knife is a deadly weapon. *See State v. Garcia*, 114 Ariz. 317, 319, 560 P.2d 1224, 1226 (1977); *State v. Williams*, 110 Ariz. 104, 105, 515 P.2d 849, 850 (1973).[2]

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[1]Much of Arizona's criminal sentencing code, and most of the statutes cited in this decision, were renumbered, effective December 31, 2008. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. We refer to the statutes as they were numbered when Hursey committed his offenses in 2006.

[2]Section 13-105(13), A.R.S., defined a deadly weapon as "anything designed for lethal use, including a firearm." 2006 Ariz. Sess. Laws, ch. 73, § 1.

And our supreme court has also stated the obvious—that a knife, like a gun, is "inherently dangerous as a matter of law." *State v. Gordon*, 161 Ariz. 308, 310, 778 P.2d 1204, 1206 (1989).

¶6 Hursey claims, however, that there was insufficient evidence of dangerousness because the knife he used to threaten D. did not qualify as a dangerous instrument under the circumstances of this case. Citing the definition of a dangerous instrument in A.R.S. § 13-105(11), 2006 Ariz. Sess. Laws, ch. 73, § 1—"anything that under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury"—Hursey claims his knife was incapable of causing serious injury because he had been several feet away from D. when he pulled the knife. However, he cites no legal authority supporting his assertion that physical proximity is relevant in determining whether a knife is a dangerous instrument, and we reject his contention. *See Gordon*, 161 Ariz. at 310, 778 P.2d at 1206 (knife inherently dangerous as matter of law). And, ample evidence was presented to demonstrate that Hursey "threatened to . . . use[]" the knife in a fashion "capable of causing death or serious physical injury."

¶7 For reasons unexplained by the record, the jury instructions the trial court gave defined "dangerous instrument" but did not define "deadly weapon," even though both terms appeared in two other instructions—the one defining a "dangerous offense" and the one listing the relevant elements of aggravated assault. By finding Hursey guilty of aggravated assault and by finding the offense dangerous, however, the jury necessarily also found as a

matter of fact that Hursey had used either a deadly weapon or a dangerous instrument. And, if it relied on the court's instructions defining only "dangerous instrument" and thus determined Hursey's knife was a dangerous instrument, the jury had implicitly made a finding that the knife was "readily capable of causing death or serious physical injury." § 13-105(11).

¶8 Hursey's argument—that he was too far away from D. for the knife to have posed any real danger—ignores the dual possibilities that he could easily have injured D. either by lunging toward him or by throwing the knife at him from such close range. Regardless, the jury's verdict negates Hursey's contention because it necessarily includes an implicit finding that the knife was capable of causing death or serious injury. We cannot say the evidence was insufficient to support that finding when our supreme court has held as a matter of law that a knife is both inherently dangerous, *see Gordon*, 161 Ariz. at 310, 778 P.2d at 1206, and, by definition, a deadly weapon. *See Garcia*, 114 Ariz. at 319, 560 P.2d at 1226; *Williams*, 110 Ariz. at 105, 515 P.2d at 850.

¶9 Asked at trial what he had been thinking when he yelled "knife," D. testified: "Well, when somebody pulls a knife on me and brandishes it in my face, I kind of feel like he is going to try to stab me." In addition, D. testified that, while displaying the knife "a few feet" away from him, Hursey had also said, "I'm going to cut you up." D.'s testimony thus supplied additional evidence that Hursey had made a "threatening exhibition of a deadly weapon or dangerous instrument" for purposes of § 13-604(P).

¶10 In his second issue, Hursey contends the trial court applied an incorrect sentencing range of ten to twenty years in enhancing his sentence. The ten-to-twenty-year range was the appropriate enhanced range in 2006 for either a nondangerous class three felony committed with two historical prior felony convictions, *see* § 13-604(D), or for a class three dangerous felony committed with one historical prior conviction for a class one, two, or three dangerous-nature felony. *See* § 13-604(J). Because the state had alleged specifically that Hursey's five historical prior felony convictions were "non-dangerous," the ten-to-twenty-year range was thus appropriate only if Hursey's sentence could be enhanced pursuant to § 13-604(D) on the basis of two historical prior nondangerous felonies. As Hursey did not object on this ground in the trial court, "he cannot obtain relief unless he shows 'both that fundamental error occurred and that the error caused him prejudice.'" *State v. Price*, 217 Ariz. 182, ¶ 20, 171 P.3d 1223, 1227 (2007), *quoting State v. Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d 601, 608 (2005).

¶11 Our review of Hursey's sentencing is made more complicated by the trial court's failure to differentiate clearly between the enhancement of Hursey's sentence and its aggravation. *See generally State v. Alvarez*, 205 Ariz. 110, n.1, 67 P.3d 706, 708 n.1 (App. 2003) ("Sentence enhancement elevates the entire range of permissible punishment while aggravation and mitigation raise or lower a sentence within that range."). Examples of statutorily created enhancements include the two that were potentially applicable here—for

prior felony convictions, *see* former § 13-604(A) through (D), and for dangerous-nature offenses, *see* § 13-604(F) through (K).

¶12 After the jury had announced its verdict, the trial court told the jurors they would be returning, after a brief recess, for the "next phase of the trial," at which the state would attempt to prove certain aggravating factors it had alleged and the jury would "decide whether the defendant should be eligible for an aggravated sentence under the law." Instead, during the recess, the parties reached an agreement that Hursey would "admit three aggravators," obviating the need for any further determination by the jury.

¶13 After the trial court advised Hursey that he had a right to have a jury determine the existence of any aggravating factors, Hursey waived a jury and admitted the following facts: that he had one previous felony conviction in Pinal County in 2004 in cause number CR2004-00310, that he had previously served time in the Department of Corrections (DOC), and that he had "left the scene of the crime" in this case. In return, the state confirmed that it was "dismissing any allegation of any other aggravating factors," and the court "accept[ed] that dismissal."

¶14 At the same time, the state offered in evidence, and the trial court admitted without objection, Hursey's "Pen Pack"—a certified, exemplified copy of his official DOC records, containing a summary of his five previous felony convictions and prison sentences, photographs and a physical description of him, and his fingerprints. The court then discharged the jury after informing them that Hursey had "decided to make admission to

three of the alleged aggravating factors . . . [a]nd in return, the State agreed to dismiss any other aggravating factors."

¶15 At sentencing the following month, the prosecutor called to the trial court's attention that Hursey had not admitted, and the court had not yet found, the existence of any historical prior felony convictions for sentence-enhancement purposes. Again appearing to conflate aggravation and enhancement, the court recited the three aggravating factors Hursey had admitted the previous month, which included one prior felony conviction. Defense counsel stated her recollection that Hursey had previously admitted, and that the court had previously found, the existence of two qualifying prior felony convictions. The court likewise recalled "that that was a requirement of the State, that Mr. Hursey make an admission to two of the prior felony convictions for enhancement purposes," but observed, correctly, that "[t]he minute entry does not reflect that." At that juncture, defense counsel stated, "Mr. Hursey does admit to two prior felony convictions within two [sic] years, both within Pinal County."

¶16 At the prosecutor's request, the trial court then made the express finding "that Mr. Hursey was previously convicted of two prior felonies within the statutory time frame. And for sentencing enhancement purposes, he is subject to being sentenced under a third felony repetitive conviction." The court stated, "I know that at the end of the trial Mr. Hursey did make those admissions to the Court." Although neither the reporter's transcript nor the minute entry from the final day of trial supports that statement, the court was correct

that defense counsel had "avow[ed] to the Court that he is not denying that at this point either."

¶17 Pursuant to § 13-604(P), a trial court may find the fact of a prior conviction for purposes of sentence enhancement by clear and convincing evidence. *State v. Cons*, 208 Ariz. 409, ¶ 15, 94 P.3d 609, 615 (App. 2004). "The proper procedure for establishing a prior conviction is for the state to submit a certified copy of the conviction and establish that the defendant is the person to whom the document refers." *Id.* ¶ 16. Although the procedure followed here was irregular, although the state did not introduce certified copies of Hursey's actual convictions but only a certified abstract of those convictions in his DOC Pen Pack, and although the record reflects that Hursey personally admitted only one of his prior felony convictions, the Pen Pack—admitted at trial without objection—nonetheless supplied reliable evidence sufficient to prove, clearly and convincingly, that Hursey did have at least two historical prior felony convictions for sentence-enhancement purposes pursuant to § 13-604(D).

¶18 The information in Hursey's authenticated Pen Pack had the following additional indicia of reliability: the documents included photographs of Hursey as well as his fingerprints and physical description; the prior felony conviction he had admitted for aggravation purposes was among the convictions listed in the abstract summarizing those convictions, further confirming that the records were indeed his; and, perhaps most importantly, Hursey did not object to the admission of the Pen Pack or challenge the accuracy

of the information it contained. Then, at sentencing, defense counsel did not object to the trial court's finding and stated that Hursey admitted he had two prior convictions that would be classified as historical prior felony convictions for the purpose of enhancement.[3] In sum, the record contains clear and convincing evidence to substantiate the existence of the two historical prior felony convictions the court found—one admitted by Hursey, the other proved by the state—on which the court properly relied in sentencing Hursey within the enhanced range of ten to twenty years provided by § 13-604(D) for a class three felony committed with two or more historical prior convictions.

¶19 In his final argument, Hursey contends the trial court relied on improper aggravating factors, other than the three he had admitted, in imposing his slightly aggravated, twelve-year sentence.[4] Again we review only for fundamental, prejudicial error because he did not object on this ground below and raises the issue for the first time on appeal. *See Price*, 217 Ariz. 182, ¶ 20, 171 P.3d at 1227; *Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d at 608.

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[3]Given that Hursey did not admit the existence of a second prior conviction for purposes of sentence enhancement with the trial court's having first informed him of his rights pursuant to Rule 17.6, Ariz. R. Crim. P., *see State v. Morales*, 215 Ariz. 59, ¶¶ 7-9, 157 P.3d 479, 481 (2007), we view counsel's statement as an acknowledgment that the Pen Pack admitted in evidence at trial was legally sufficient to prove the existence of the second conviction that Hursey had not personally admitted.

[4]The sentencing minute entry incorrectly identifies the sentence imposed as a presumptive term. In its oral pronouncement, the trial court did not characterize the sentence as either aggravated or presumptive, although it did enumerate the mitigating and aggravating circumstances it found.

¶20 As established by the Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), a defendant is entitled to have a jury find beyond a reasonable doubt the existence of any aggravating factors—except a prior felony conviction—used to support the court's imposition of a sentence greater than that authorized by the jury's verdict or the defendant's admissions. *See Apprendi*, 530 U.S. at 490 ("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."); *State v. Brown*, 209 Ariz. 200, ¶ 12, 99 P.3d 15, 18 (2004) (under Arizona's sentencing regime, maximum sentence justified by jury verdict alone is presumptive term). However, "once a jury finds or a defendant admits a single aggravating factor, the Sixth Amendment permits the sentencing judge to find and consider additional factors relevant to the imposition of a sentence up to the maximum [permitted]" within the applicable statutory sentencing range. *State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005).

¶21 By filing a written allegation of aggravating circumstances before trial, the state put Hursey on notice of the various factors it hoped to prove, and to have the jury find beyond a reasonable doubt, in order to establish Hursey's eligibility for an aggravated sentence in compliance with *Blakely*. By agreeing to admit three of the alleged factors instead, Hursey obviated the need for jury findings while also presumably limiting the state's

presentation—and thus the trial court's detailed exposure to—additional evidence that would not have been favorable to him.

¶22 Once Hursey had admitted and the trial court had found any one of those three factors, the court was entitled to consider any additional aggravating factors it deemed relevant to its discretionary determination of an appropriate sentence within the aggravated range. *Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d at 625. Notwithstanding the state's having dismissed the allegations of other aggravating factors it had alleged in return for Hursey's admissions of three of those factors at trial, nothing in the record suggests the parties or the court envisioned that the three aggravating factors Hursey had admitted for *Blakely* purposes were the only evidence the court could later consider in aggravation at sentencing.

¶23 In particular, we note that, following Hursey's admissions at trial, the trial court advised counsel to confer about a date and time for an aggravation and mitigation hearing if one was needed prior to sentencing. In addition, Hursey did not object at the sentencing hearing, either when the prosecutor asked the court to consider factors in aggravation beyond the three Hursey had already admitted or when the court found those additional factors to be, in fact, aggravating circumstances.[5] The state was free to argue, and the court could properly

[5]After asking the trial court to "adopt the aggravating factors" that Hursey had admitted previously, the prosecutor argued that "of most importance" were Hursey's "lengthy criminal history" and the fact he had failed to learn or benefit from any of his previous experiences but instead "continue[d] to commit crimes over and over again, in spite of his age," which was then fifty-six. The aggravating factors the court found were "that [Hursey] ha[d] been previously convicted of four felonies within the ten years immediately preceding the date of this offense," that "[his] conduct in th[is] case was not an isolated incident but a

find, other factors in aggravation beyond the ones Hursey had previously admitted for *Blakely* purposes. *See generally Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d at 265. And we do not agree with Hursey's bald, unsupported assertion that none of the factors the court cited were "appropriate for aggravation." In short, we find no fundamental error.

¶24 Hursey's conviction and sentence are affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge

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continuing type of behavior," and that "[he] ha[d] failed to benefit from past lenient treatment by the Court." These were also the three aggravating factors identified in the probation department's presentence report, to which Hursey had apparently raised no objection.