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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THE STATE OF ARIZONA, Appellee, v. JOHNNY RAY FIGUEROA, Appellant.	2 CA-CR 2009-0068 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200800799

Honorable Bradley M. Soos, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

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

Harriette P. Levitt — Tucson
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 Following a jury trial, appellant Johnny Ray Figueroa was convicted of aggravated assault and resisting arrest, class six felonies. The trial court found Figueroa had four historical prior felony convictions; sentenced him to concurrent, presumptive 3.75-year prison terms; and imposed a $1,000 prosecution fee. On appeal, Figueroa claims the

evidence was insufficient to sustain the guilty verdicts, his sentences were illegally enhanced, and the prosecution fee was illegal.

Sufficiency of the Evidence

¶2 Section 13-1203(A)(2), A.R.S., states that a person commits assault by "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury." Simple assault becomes aggravated assault under A.R.S. § 13-1204(A)(8)(a), if the offender knows or has reason to know that the victim is a peace officer acting in that capacity. Section 13-2508(A)(1), A.R.S., provides that a person resists arrest by "intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer . . . from effecting an arrest by . . . [u]sing or threatening to use physical force against the peace officer."

¶3 Figueroa contends that "[t]here was not even a scintilla of evidence" to establish that he assaulted the officer or that he used or threatened to use physical force to resist arrest. He relies on the officer's use of the word "like" in the officer's testimony. We will reverse a conviction based on a claim of insufficient evidence "'only where there is a complete absence of probative facts to support the conviction.'" *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996), *quoting State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976). We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the jury's verdicts. *See State v. Jeffrey*, 203 Ariz. 111, ¶ 2, 50 P.3d 861, 862 (App. 2002). So viewed, the evidence established the following. When police officer Darwin Banks responded to an early morning domestic violence call in November 2007, he found Figueroa and his wife arguing in the middle of the street in front

of their home in the town of Superior. Banks testified that Figueroa was yelling profanities at his wife, who told Banks that Figueroa had broken "everything in the house." She asked Banks to stop Figueroa from "go[ing after her] niece," explaining that she was afraid Figueroa would harm the niece. Banks identified himself as a police officer and ordered Figueroa to "stand by" while he investigated the situation.

¶4 Figueroa directed numerous obscenities and racial epithets at Banks, telling Banks he was going to "kick [his] f___ing ass" and to leave the scene, causing Banks to be concerned for his own safety, particularly because he was the only police officer on duty. Figueroa assumed "a fighting stance," a position Banks demonstrated for the jury. He explained that Figueroa had "put[] his arms up with his fists" while he taunted Banks by saying, "What the f___ are you going to do?" Banks testified that when Figueroa "charged" at him as he backed away, he shot Figueroa with his taser gun to protect himself. Figueroa then "ripped" the taser prongs out of his chest and told Banks, "Now what are you going to do? I told you that f___ing taser wasn't going to work," after which Banks informed Figueroa he was under arrest. Figueroa fled, and Banks pursued him. Banks caught up with Figueroa, and Figueroa again charged at Banks. Banks shot Figueroa with the taser gun, and Figueroa again pulled the taser out of his chest. Banks ultimately apprehended Figueroa and arrested him.

¶5 The record is replete with evidence from which reasonable jurors could find Figueroa intentionally had placed Banks in reasonable apprehension of imminent physical injury knowing that Banks, who was dressed in full uniform and had identified himself as a police officer, was "engaged in the execution of . . . official duties" and that Figueroa had

threatened physical force against Banks in order to prevent Banks from arresting him. *See* §§ 13-1203(A)(2), 13-1204(A)(8)(a), 13-2508(A)(1).

Illegal Sentence

¶6 Figueroa contends his sentence was illegal because the state's allegation that he had historical prior felony convictions referred to the incorrect subsection of the relevant sentencing statute, A.R.S. § 13-604.[1] Rather than referring to § 13-604(C), the subsection that addresses repetitive offenders, like Figueroa, who have two or more historical prior felony convictions, the state relied on § 13-604(A), the subsection that addresses defendants with only one prior felony conviction. Figueroa does not dispute the existence of these prior convictions. He argues for the first time on appeal that his enhanced sentences are illegal because the state did not cite the proper subsection of the statute, resulting in the imposition of a longer sentence (3.75 years) than the maximum sentence permitted under the cited subsection of the statute (2.25 years). Because Figueroa did not preserve his claim by objecting below, we review it only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Figueroa concedes he did not object in the trial court but appears to argue his sentence is illegal and, therefore, fundamental error that he is entitled to raise on appeal nevertheless. *See State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002) ("[i]mposition of an illegal sentence constitutes fundamental error").

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[1]Significant portions of the Arizona criminal sentencing code were renumbered, effective December 31, 2008. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. We refer in this decision to the statutes as they were numbered when Figueroa committed the offenses, rather than current section numbers.

¶7 Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). To obtain relief, Figueroa must demonstrate not only that fundamental error occurred but also that he was prejudiced by it. *Id.* ¶ 20. Although the state acknowledges that it cited the wrong subsection of the statute in the sentence-enhancement allegation, it asserts the error is not fundamental. We agree.

¶8 The record shows that, despite the reference to the wrong subsection, Figueroa had notice that the state intended to use more than one prior felony conviction to enhance his sentences. *See State v. Benak*, 199 Ariz. 333, ¶ 16, 18 P.3d 127, 131 (App. 2001) (state's notice to defendant it intends to seek sentence enhancement based on prior felony convictions must not mislead, surprise, or deceive defendant). Not only did the allegation of prior convictions refer to four prior convictions, but on the same day the state filed the allegation, it filed its initial notice of disclosure, in which it stated it "intend[ed] to use . . . any prior felony convictions of the defendant . . . for sentence enhancement under [§] 13-604." In addition, in three subsequent supplemental disclosure pleadings, the state provided Figueroa with what appears to be documentation regarding all four of the prior convictions it intended to use. Notably, Figueroa did not object to the admission of evidence of the four prior convictions at the prior convictions trial or question why the state was presenting evidence of four convictions if it was only seeking to enhance the sentence based on one conviction. Moreover, Figueroa did not object at sentencing when the court stated he had four prior

convictions and expressly found two of them to be prior historical felony convictions for sentencing purposes. In fact, Figueroa's attorney did not object to the mention of two prior convictions in the presentence report or to the sentencing range set forth in the report, which comported with § 13-604(C), and not § 13-604(A). Rather, counsel urged the court to impose mitigated, concurrent terms, consistent with the range in the presentence report. In light of the numerous references to four prior convictions and the absence of any objection by Figueroa, either before trial, at the prior convictions trial, or at sentencing, Figueroa has failed to show he was misled or in any way prejudiced by the initial reference to the incorrect subsection of § 13-604.

¶9 In addition, we decline to address Figueroa's argument, raised for the first time in his reply brief, that he was prejudiced because his prior convictions were too remote to qualify as historical prior felony convictions under § 13-604(A). We will not consider arguments raised for the first time in a reply brief. *See State v. Watson*, 198 Ariz. 48, ¶ 4, 6 P.3d 752, 755 (App. 2000).[2]

Prosecution Fee

¶10 Figueroa contends the imposition of the $1,000 prosecution fee pursuant to Pinal County Ordinance 91097-PS was illegal. We recently addressed this very issue in *State v. Payne*, Nos. 2 CA-CR 2008-0166, 2 CA-CR 2008-0171, 2 CA-CR 2008-0309 (Consolidated), 2009 WL 2211036 (Ariz. Ct. App. July 24, 2009). In that case, we concluded that the prosecution fee based on the same Pinal County ordinance was statutorily

[2]We likewise reject Figueroa's argument, also raised for the first time in his reply brief, that Banks lacked probable cause to arrest him. *See Watson*, 198 Ariz. 48, ¶ 4, 6 P.3d at 755.

unauthorized and thus constituted an illegal sentence. *Id.* ¶¶ 1, 49. Based on the state's supplemental authority citing the *Payne* decision, the state implicitly concedes this was error. Accordingly, for the reasons set forth in that decision, we vacate the portion of the judgment of sentence imposing the $1,000 fee.

Disposition

¶11 We affirm the convictions and the sentences as modified to reflect that the $1,000 prosecution fee is vacated.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

PETER J. ECKERSTROM, Judge