

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

DILLON ALLEN WEBER,  
*Appellant.*

No. 2 CA-CR 2014-0345  
Filed July 16, 2015

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

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Appeal from the Superior Court in Pima County  
No. CR20131386001  
The Honorable Richard D. Nichols, Judge

**AFFIRMED IN PART; REVERSED AND REMANDED IN PART**

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COUNSEL

Mark Brnovich, Arizona Attorney General  
Joseph T. Maziarz, Section Chief Counsel, Phoenix  
By Tanja K. Kelly, Assistant Attorney General, Tucson  
*Counsel for Appellee*

Steven R. Sonenberg, Interim Pima County Public Defender  
By Erin K. Sutherland, Assistant Public Defender, Tucson  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

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ECKERSTROM, Chief Judge:

¶1 Dillon Weber appeals from his conviction and sentence for second-degree trafficking in stolen property. For the following reasons, we affirm his conviction but vacate his sentence and remand for resentencing.

**Factual and Procedural Background**

¶2 On January 30, 2013, Y.G. noticed some jewelry was missing from her bedroom dresser. The missing pieces included some distinctive items, such as a mother's ring with her children's birthstones, a ring bearing the name of her deceased son, and a tricolor dolphin ring. She could not say for certain when the jewelry had gone missing, but noted she had last seen it "[t]he weekend before that." She contacted police to report the theft.

¶3 Detective D.L. of the Pima County Sheriff's Department used an electronic database of items sold to pawn shops to search for Y.G.'s jewelry. The detective recovered the jewelry from a pawn shop in Pima County. The pawn shop provided the transaction receipts for the jewelry, of which there were five total. Two of the receipts were dated January 22, 2013, and three were dated January 29, 2013. The receipts had Weber's name, an address and phone number that were consistent for all five slips, and Weber's fingerprint. A pawn shop employee testified that anyone who wishes to sell items must provide picture identification. The employee also testified that he would "verify that the picture on the license matches the person" before purchasing any items.

¶4 Y.G. testified that Weber was a long-time friend of one of her sons and she had seen him at her workplace in January 2013. But she did not give the jewelry to anyone to sell, nor did she ever

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give Weber permission to take it. During trial, Weber provided no theory through witness testimony, cross-examination, or argument, for how he had come to be in possession of the jewelry.

¶5 As noted above, Weber was convicted after a jury trial of a single count of second-degree trafficking in stolen property. He was sentenced to an enhanced, presumptive 6.5-year prison term. This appeal followed.

**Duplicitous Charge**

¶6 Weber first claims his charge was duplicitous because, although he was charged with only one count of trafficking in stolen property, the state presented evidence of “five distinct acts of trafficking, committed on different dates.” As Weber acknowledges, he did not object on this basis to the trial court, and our review is therefore limited to fundamental, prejudicial error. *See State v. Henderson*, 201 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). A duplicitous charge constitutes fundamental error because it “raises the possibility that the defendant’s right to a unanimous jury verdict . . . may be violated.”<sup>1</sup> *State v. Klokic*, 219 Ariz. 241, ¶ 32, 196 P.3d 844, 851 (App. 2008); *accord State v. Delgado*, 232 Ariz. 182, ¶¶ 18-19, 303 P.3d 76, 82 (App. 2013).

¶7 When the prosecution introduces more than one act that could constitute the charged offense, this is referred to as a “duplicitous charge.” *Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d at 847. In

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<sup>1</sup>We note that problems other than a non-unanimous jury verdict may result from duplicitous charges—problems concerning notice to the defendant, future jeopardy pleading, and sentencing issues such as the one discussed below. *See State v. Davis*, 206 Ariz. 377, ¶ 54, 79 P.3d 64, 76 (2003). These issues may not be entirely resolved by a “single transaction” test. *State v. Klokic*, 219 Ariz. 241, ¶ 25, 196 P.3d 844, 849-50 (App. 2008). However, because Weber has focused his argument on the risk of non-unanimity, we will not consider whether other kinds of prejudice may have occurred. *See Henderson*, 201 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08 (defendant’s burden to demonstrate prejudice under fundamental error review).

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such a case, the trial court generally must require the state to elect which of the acts constitutes the crime or instruct the jurors that they must unanimously agree on one specific act. *Id.* ¶ 14. However, these measures are not required when “all the separate acts . . . are part of a single criminal transaction.” *Id.* ¶ 15. “[M]ultiple acts may be considered part of the same criminal transaction ‘when the defendant offers essentially the same defense to each of the acts and there is no reasonable basis for the jury to distinguish between them.’” *Id.* ¶ 18, quoting *People v. Stankewitz*, 793 P.2d 23, 41 (Cal. 1990); see also *State v. Counterman*, 8 Ariz. App. 526, 531-32, 448 P.2d 96, 101-02 (1968).

¶8 Here, evidence was introduced of five distinct acts of trafficking in stolen property, occurring on two distinct dates one week apart. Weber offered the same defense to each of the acts: that he had no reason to know the jewelry was stolen. The jury was in the position of either believing or not believing Weber was aware of and consciously disregarded a substantial risk that the property was stolen. See A.R.S. §§ 13-105(10)(c),<sup>2</sup> 13-2307(A); *State v. Schroeder*, 167 Ariz. 47, 53, 804 P.2d 776, 782 (App. 1990).

¶9 Nor was there any reasonable basis to distinguish between the acts. The nature and quantum of evidence presented on each act was identical and nothing suggested that Weber had any different knowledge on January 22 than he did on January 29. Thus there was no risk that some jurors would convict based on one of the acts occurring on the 22nd, whereas others would convict based on the acts occurring on the 29th. We disagree with Weber’s implicit suggestion that passage of one week alone is enough to create a reasonable basis to distinguish acts.<sup>3</sup> Accordingly, we conclude the

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<sup>2</sup>We cite the current version of this statute because no revisions material to this decision have since occurred.

<sup>3</sup>Weber asserts *State v. Flores*, 236 Ariz. 33, 335 P.3d 555 (App. 2014), requires this court to conclude the acts alleged were not part of the same criminal transaction. *Flores* applied the test enumerated in *State v. Kelly*, 190 Ariz. 532, ¶ 6, 950 P.2d 1153, 1155 (1997), for whether offenses were committed on the same occasion for

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court did not fundamentally err by not ordering, sua sponte, a remedial measure to the duplicitous charges.

**Historical Prior**

¶10 Weber also contends the trial court erred in sentencing him as a category two repetitive offender. Weber bases his contention on the fact that the historical prior felony conviction found by the trial court was committed at the earliest on January 27, 2013, but he was convicted in this case for an offense occurring on January 22, 2013. See 2012 Ariz. Sess. Laws, ch. 190, § 2 (former A.R.S. § 13-703(B)(2), (I)). Weber did not present this particular objection to the trial court and has therefore forfeited review absent fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08. However, an illegal sentence constitutes such an error. *State v. Forde*, 233 Ariz. 543, ¶ 137, 315 P.3d 1200, 1231 (2014).

¶11 Here, the jury essentially found that a single course of trafficking in stolen property occurred between January 22 and January 29. We have concluded, as the state has urged, that this was a “single criminal transaction.” *Klokie*, 219 Ariz. 241, ¶ 15, 196 P.3d at 847. Accordingly, Weber’s crime began on January 22 and ended on January 29. January 27, a date in the middle of this criminal transaction, thus does not precede this crime. We cannot say the offense committed on January 27, 2013 “was committed within the five years immediately preceding the date of the present offense,” and therefore it was not a historical prior felony conviction as defined in § 13-105(22)(c).

¶12 The state argues that Weber’s sentence may be upheld nonetheless because he would have been sentenced as a category two repetitive offender even if the January 27 offense were not a historical prior. The state bases this argument on § 13-703(B)(1) and the fact that Weber was convicted of two felonies in a separate case number along with a third felony in this case. 2012 Ariz. Sess. Laws, ch. 190, § 2. But § 13-703(B)(1) requires “three or more felony

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sentencing purposes. *Flores*, 236 Ariz. 33, ¶¶ 6-8, 335 P.3d at 557-58. It is inapposite here.

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offenses that were not committed on the same occasion.” 2012 Ariz. Sess. Laws, ch. 190, § 2. Whether the two felonies committed in the separate case number were “committed on the same occasion” was not addressed by the trial court. 2012 Ariz. Sess. Laws, ch. 190, § 2. This is a fact-intensive question, and because Weber did not raise the issue below, the state had no opportunity to develop a record on this matter. *See State v. Kelly*, 190 Ariz. 532, ¶¶ 6, 11-12, 950 P.2d 1153, 1155, 1156 (1997) (listing factors to be applied and remanding to allow development of factual record). We therefore decline to resolve it on appeal.

**Disposition**

¶13 For the foregoing reasons, Weber’s conviction is affirmed. We remand this matter to the trial court for resentencing consistent with this decision.