

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

OREL VASQUEZ,
Appellant.

No. 2 CA-CR 2012-0312
Filed January 30, 2014

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20110455003
The Honorable Clark W. Munger, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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Counsel for Appellee

John William Lovell, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Howard concurred.

MILLER, Judge:

¶1 Orel Vasquez was convicted after a jury trial of first degree murder, first degree burglary, four counts of kidnapping, four counts of armed robbery, four counts of aggravated robbery, five counts of aggravated assault, and four counts of attempted kidnapping. Vasquez argues the following trial court errors occurred: the admission into evidence of an accomplice's plea agreement, improper jury instruction on reasonable doubt, prosecutorial vouching during closing arguments, and errors and inconsistencies in the sentences. For the reasons set forth below, we affirm Vasquez's convictions and sentences in part, and remand for resentencing to address certain sentencing errors. We also vacate the criminal restitution order.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). We also include pertinent procedural matters relevant to Vasquez's arguments on appeal.

¶3 In August 2009, Vasquez, his co-defendant and brother Christian Vasquez, Juan Leon, and two others participated in a home invasion. After demanding marijuana, money, and jewelry from the home's occupants, the armed men left the house and surrounded an approaching car. The men banged on the windshield and attempted to open the driver's door. As the car began to accelerate away from the assailants, one of the men shot and killed the front passenger.

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¶4 Approximately two years after the shooting, Vasquez, Christian, and Leon surrendered to law enforcement. Leon entered into a plea agreement whereas Vasquez and Christian proceeded to trial.

¶5 At trial, Leon was questioned extensively about the terms of his plea agreement. The trial court, over Vasquez's objection, admitted Leon's plea agreement, stating "[Leon's] bargain with the State is something that is an issue, and I think the jury needs to see this." During closing argument, the prosecutor rebutted attacks on Leon's credibility, asserting that Leon's testimony was not "bought and paid for" and encouraging the jury to "look at the special terms of [Leon's] plea, because the things that the plea requires is that he testify truthfully or that he not blame anyone that is innocent."

¶6 Vasquez was convicted of all charges and the trial court sentenced him to natural life for first degree murder, with a combination of consecutive and concurrent sentences totaling 189 years' imprisonment for the remaining charges. Vasquez timely appealed his convictions and sentences.

Leon's Plea Agreement

¶7 Vasquez argues that the trial court erred in admitting the special terms section of Leon's plea agreement because such evidence was irrelevant, cumulative, and constituted impermissible vouching. The parties disagree about whether Vasquez specifically objected on grounds of relevance and vouching. The objection was not stated in those specific terms, but Vasquez stated concern about "other verbiage" and the consequences if he did not testify truthfully. This was sufficient to preserve the objections for appellate review. "The admission of evidence is within the trial court's discretion and will not be disturbed absent an abuse of discretion." *State v. Davolt*, 207 Ariz. 191, ¶ 60, 84 P.3d 456, 473 (2004).

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Relevance

¶8 Vasquez contends that the special terms section of the plea agreement was irrelevant to Leon’s credibility or willingness to testify truthfully. “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Ariz. R. Evid. 401.

¶9 In *State v. McCall*, 139 Ariz. 147, 159, 677 P.2d 920, 932 (1983), the appellant argued, as Vasquez does here, that a witness’s promise in his plea agreement to testify truthfully was irrelevant. Our supreme court rejected this argument, concluding, “[A]ny evidence that substantiates the credibility of a prosecution witness on the question of guilt is material and relevant and may be properly admitted.” *Id.*; see also *State v. Thomas*, 130 Ariz. 432, 434, 636 P.2d 1214, 1216 (1981). Here, the plea agreement related directly to the credibility of the prosecution’s main witness. Thus, the trial court did not err in finding that Leon’s plea agreement was relevant evidence. See *McCall*, 139 Ariz. at 158, 677 P.2d at 931.

Rule 403

¶10 Vasquez further asserts that the trial court erred in admitting Leon’s plea agreement because its probative value was outweighed by the risks of unfair prejudice, confusion of the issues, misleading the jury, and needlessly presenting cumulative evidence. We disagree.

¶11 Rule 403, Ariz. R. Evid., provides that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” We therefore determine whether Leon’s plea agreement satisfied any of the criteria for exclusion under Rule 403.

¶12 As previously noted, Leon’s plea agreement was relevant as it concerned the credibility of a prosecution witness. See *McCall*, 139 Ariz. at 158, 677 P.2d at 931. The plea agreement

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provided that the trial court would assess whether Leon had lied only if the state sought to withdraw from the plea agreement. Nothing in the special terms of Leon's plea agreement suggested to the jury that the court already had determined that Leon was truthful; further, there was no argument to the jury that such a determination had occurred. Thus the plea agreement could not be characterized as confusing the issues or misleading the jury. Moreover, Leon's credibility was challenged from the beginning of trial. Finally, we note the record does not support an objection based on needlessly cumulative evidence; but even if properly preserved, the objection is unavailing because the plea represented the most accurate evidence to demonstrate the content of Leon's agreement with the state.

Alleged Vouching

¶13 Vasquez contends the admission of the special terms section coupled with the prosecutor's remarks during closing argument constituted impermissible vouching. "There are 'two forms of impermissible prosecutorial vouching: (1) where the prosecutor places the prestige of the government behind its witness; [and] (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony.'" *State v. King*, 180 Ariz. 268, 276-77, 883 P.2d 1024, 1032-33 (1994), quoting *State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989) (alteration in *King*).

¶14 Here, as in *McCall*, vouching of the second type is alleged. 139 Ariz. at 159, 677 P.2d at 932. In *McCall*, the charge of vouching was based on the prosecutor's eliciting testimony that, pursuant to a plea agreement, the witness promised "[t]o testify truthfully whenever called upon before any State or Federal law enforcement agency." *Id.* Our supreme court found "nothing improper in this questioning," noting that "[t]he prosecutor did not express any personal opinion regarding the truth of [the witness's] testimony nor did he refer in his questioning or in his closing argument to any information outside the knowledge of the jury." *Id.*

¶15 Similarly, the prosecutor in this case did not place the prestige of the government behind Leon's testimony by personally

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assuring the jury of his veracity, nor did the prosecutor suggest that evidence not presented to the jury supported his testimony. *See id.*; *cf. State v. Vincent*, 159 Ariz. 418, 423-24, 768 P.2d 150, 155-56 (1989) (holding state engaged in impermissible vouching when it argued “the State wouldn’t have put [the witness] on the witness stand if [it] didn’t believe every word out of his mouth”). Rather, the prosecutor directed the jury to examine the contents of Leon’s plea agreement, a document admitted into evidence, merely for the purpose of demonstrating that Leon had no motive to testify falsely. Thus, the prosecutor’s statements did not amount to improper vouching. *See McCall*, 139 Ariz. at 159, 677 P.2d at 932; *see also United States v. Ricco*, 549 F.2d 264, 274 (2d Cir. 1977) (no improper vouching where prosecutor remarked that if accomplice witnesses testified falsely, indictment for perjury could result).

¶16 In sum, the trial court did not err in admitting Leon’s plea agreement into evidence, and the prosecutor’s reference to the special terms section did not constitute vouching.

Reasonable Doubt Instruction

¶17 Vasquez next contends the trial court erred in instructing the jury on reasonable doubt in accordance with *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995). He asserts the *Portillo* instruction “impermissibly shifts the burden of proof to the defense” and violates his constitutional rights.

¶18 As Vasquez acknowledges, however, our supreme court has repeatedly rejected similar challenges to the instruction *Portillo* requires. *See, e.g., State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *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. 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), and, accordingly, do not address this argument further.

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Illegal Sentences on Counts Twelve and Fifteen

¶19 Vasquez next argues, and the state concedes, that the trial court imposed illegal sentences on Counts Twelve and Fifteen. Because he failed to raise this issue below, we review only for fundamental, prejudicial error, which includes imposition of an illegal sentence. *See State v. Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d 263, 266 (App. 2007).

¶20 Vasquez was charged and convicted of aggravated robbery for Count Twelve and aggravated assault with a deadly weapon/dangerous instrument for Count Fifteen. Both were dangerous offenses with no other applicable enhancements, and both are class three felonies.¹ A.R.S. §§ 13-1204(D); 13-1903(B).

¶21 The trial court sentenced Vasquez to twenty-one years for each count. Accordingly, the court's sentence exceeded the statutory maximum of fifteen years and was therefore unlawful. *See* A.R.S. § 13-704(A); *State v. House*, 169 Ariz. 572, 573, 821 P.2d 233, 234 (App. 1991) ("An unlawful sentence is one that is outside the statutory range."). Accordingly, we vacate Vasquez's sentences on Counts Twelve and Fifteen and remand for resentencing within the correct statutory range, not to exceed the statutory maximum of fifteen years for each count.

Other Sentencing Errors

¶22 Vasquez raises various other challenges to the trial court's sentence, including inconsistencies between the oral pronouncement of sentence and the sentencing minute entry. The state agrees with his claims.

¶23 We review a trial court's sentence for an abuse of discretion. *State v. Ward*, 200 Ariz. 387, ¶ 5, 26 P.3d 1158, 1160 (App. 2001); *see also State v. Vermuele*, 226 Ariz. 399, ¶ 15, 249 P.3d 1099,

¹The statutory maximum for a class two felony, dangerous offense is twenty-one years. A.R.S. § 13-704(A). The statutory maximum for a class three felony, dangerous offense is fifteen years. *Id.*

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1103 (App. 2011). When a discrepancy exists between the court's oral pronouncement of sentence and the sentencing minute entry, "a reviewing court must try to ascertain the trial court's intent by reference to the record." *State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992). Generally, any discrepancy is resolved by reference to the oral pronouncement, *State v. Hanson*, 138 Ariz. 296, 304-05, 674 P.2d 850, 858-59 (App. 1983), but if we cannot ascertain the court's intent, a "remand for clarification of sentence is appropriate," *State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992); see also *State v. Provenzano*, 221 Ariz. 364, ¶¶ 25-26, 212 P.3d 56, 62 (App. 2009).

Amended Counts Eighteen and Nineteen

¶24 Vasquez first argues that the trial court's sentencing minute entry incorrectly states that amended Counts Eighteen and Nineteen are class two felonies. Both counts charge aggravated assault with a deadly weapon/dangerous instrument, which is a class three felony. A.R.S. § 13-1204(A)(2), (D). At sentencing, the court summarized the jury's findings and indentified Counts Eighteen and Nineteen as class two felonies. Later, during the court's oral pronouncement of sentence, the court identified Counts Eighteen and Nineteen as class three felonies. The sentencing minute entry also incorrectly refers to amended Counts Eighteen and Nineteen as class two felonies. The court's sentence of fifteen years was the maximum sentence for a class three felony under the permissible statutory range, see A.R.S. § 13-704(A), but it is unclear whether the court intended to sentence Vasquez to a maximum sentence. If the court mistakenly believed it was sentencing Vasquez for class two felonies, then it would appear it wished to impose a sentence less than the maximum. See A.R.S. § 13-704(A). Because we remand for resentencing on other grounds, we do not attempt to reconcile the differences among the minute entry and the court's conflicting class identifications for Counts Eighteen and Nineteen during sentencing. Accordingly, we vacate the sentences for Counts Eighteen and Nineteen and remand for resentencing as class three felonies.

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Amended Count Twenty

¶25 Vasquez next argues the trial court's minute entry incorrectly referred to amended Count Twenty² as a dangerous crime against a child. The only dangerous crimes against children were Count Six and amended Count Twenty-three. The sentencing minute entry incorrectly refers to amended Count Twenty as a dangerous crime against a child. The court's sentence was within the statutorily permitted range, however. *See* A.R.S. § 13-704(A). Thus, the minute entry shall be amended to reflect that amended Count Twenty is not a dangerous crime against a child.

Issues Relating to Count Two

¶26 Vazquez raises issues relating to Count Two, the first-degree burglary charge. Count Two named four victims: E.R., P.R., J.V., and L.D.³ The trial court's oral pronouncement of sentence was organized by victim. In following this format, the court imposed a sentence for Count Two for each victim. Because the court imposed consecutive sentences by victim, Vasquez would serve a total of four, twenty-one year sentences on Count Two.⁴ As Count Two is only a single charge of first-degree burglary, the maximum permissible sentence under the relevant statute is twenty-one years. *See* A.R.S. § 13-704(A). Thus, the court's oral pronouncement of

²Although Vasquez contends the minute entry incorrectly refers to amended Count Twenty-one, it appears Vasquez actually refers to amended Count Twenty.

³The trial court's oral pronouncement of sentence incorrectly refers to count two as count twenty-two when discussing L.D.

⁴We note that the sentencing minute entry describes Count Two as a twenty-one-year sentence of imprisonment to run "concurrent with sentences imposed in Count Three, Count Seven, Count Twelve, Count Fifteen, Count Ten, Count Fourteen, Count Nine, Count Thirteen, Count Seventeen, Count Five, and Count Four." Because we remand for resentencing on other grounds, we do not attempt to reconcile the conflict between oral pronouncement and the minute entry.

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sentence exceeds the statutory maximum for a class two dangerous felony and is unlawful. We therefore vacate the court's sentence for Count Two and remand for resentencing within the correct statutory range, not to exceed twenty-one years.

Counts Pertaining to Nonexistent Victim

¶27 Vasquez asserts that the trial court imposed a sentence for a nonexistent victim. For Count Five, the court stated that it imposed a sentence for L.R. L.R. was not mentioned in the indictment, at trial, or in the pre-sentence report. Rather, Count Five identified L.D. as a victim. It appears as though the court took the first name of the named victim, L.D., and added the last name of another victim, J.R., to create what amounted to a nonexistent victim, L.R. The state suggests we amend Count Five to run concurrent with L.D.'s other counts, Nine, Thirteen and Seventeen. It is possible, however, for Count Five to run consecutive to L.D.'s other counts as well as to the counts identifying other victims. Therefore, we vacate the sentence for Count Five, remand for resentencing, and direct that the correct victim, L.D., be identified.

Criminal Restitution Order

¶28 Although Vasquez has not raised the issue on appeal, we find fundamental error associated with the criminal restitution order (CRO). *See* A.R.S. § 13-805.⁵ In the sentencing minute entry, the trial court ordered that "all fines, fees, assessments and/or restitution are reduced to a Criminal Restitution Order, with no interest, penalties or collection fees to accrue while [Vasquez] is in the Department of Corrections." The trial court's imposition of the CRO before the expiration of Vasquez's sentence "'constitute[d] an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013),

⁵Section 13-805 has been amended three times since the date of the crimes. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4. We apply the version in effect at the time of the crimes. *See* 2005 Ariz. Sess. Laws, ch. 260, § 6; *State v. Lopez*, 231 Ariz. 561, n.1, 298 P.3d 909, 910 n.1 (App. 2013).

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quoting State v. Lewandowski, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This remains true even though the court ordered that the imposition of interest be delayed until after Vasquez's release. *See id.* ¶ 5.

Conclusion

¶29 For the foregoing reasons, we affirm Vasquez's convictions and affirm his sentences, in part. We vacate Vasquez's sentences for Counts Two, Five, Twelve, Fifteen, Eighteen, and Nineteen. We also vacate the CRO.

¶30 The trial court shall resentence Vasquez for Counts Eighteen and Nineteen, both class three felonies, within the correct statutory range, not to exceed fifteen years. The court shall also resentence Vasquez for Count Two within the correct statutory range, not to exceed twenty-one years. In addition, the oral pronouncement and minute entry shall identify the four victims named under Count Two, E.R., P.R., J.V., and L.D. The court shall resentence Vasquez for Count Five and shall identify the correct victim, L.D. We leave it to the court's discretion whether the sentence for Count Five should run consecutive to or concurrent with Vasquez's other counts. The court shall also resentence Vasquez for Counts Twelve and Fifteen within the correct statutory range, not to exceed the statutory maximum of fifteen years for each count. Moreover, the minute entry shall be amended to reflect that Count Twenty is not a dangerous crime against a child.