IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ANDREW BRADFORD TREE,
Appellant.
No. 2 CA-CR 2013-0374
Filed July 14, 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NOT FOR PUBLICATION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 Cochise County
No. CR201200536
The Honorable Wallace R. Hoggatt, Judge

AFFIRMED WITH CORRECTIONS; VACATED AND REMANDED IN PART

COUNSEL

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Counsel for Appellee

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MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 Following a jury trial in 2013, appellant Andrew Tree was convicted of first-degree burglary, two counts of aggravated assault with a deadly weapon, two counts of weapons misconduct, two counts of aggravated assault against a peace officer, two counts of theft, and false reporting. The trial court found Tree had one historical prior felony conviction and had committed the offenses while on probation and sentenced him to presumptive, concurrent and consecutive terms of imprisonment totaling 21.25 years, with credit for time served on count ten and 331 days' credit on counts one, two, six and ten.[1] This appeal, in which Tree challenges some of the sentences imposed, followed. For the following reasons, we affirm Tree's convictions, direct corrections in the sentencing minute entry order as to counts six and seven, vacate the sentences as to counts four and five, and remand for resentencing for those counts.

¶2 The underlying convictions arose from a September 2012 incident during which Tree ran from two police officers and pointed two handguns he had stolen at the officers. On appeal, Tree first argues the written sentencing order mistakenly reflects a 2.5-year prison term for both counts of aggravated assault against a peace officer (counts six and seven), rather than the presumptive, 2.25-year sentence the trial court had intended to impose for those counts. *See* A.R.S. § 13-703(I). At the sentencing hearing, the court imposed "the presumptive term of 2.5 years" on count six but imposed "the presumptive term of 2.25 years" on count seven,

[1]After granting Tree's motion for judgment of acquittal on count eight, the trial court renumbered counts nine, ten and eleven as counts eight, nine and ten.

which was essentially identical to count six. Moreover, the relevant portion of the written sentencing order states the court imposed a "presumptive" 2.5-year sentence on both of these counts.

¶3 Notably, the trial court expressly stated it was imposing a "presumptive" sentence, which is 2.25 years, as to both counts. *See* § 13-703(I). Nor did the court find any aggravating factors related to these counts. *See* A.R.S. § 13-701(C). Finally, the state concedes the imposition of the 2.5-year sentences in the written sentencing order was error.[2] We agree the 2.5-year sentences constitute error.

¶4 Tree also contends the trial court erred in ordering that the sentences for weapons misconduct (counts four and five) be served consecutively[3] to the sentences for first-degree burglary and aggravated assault with a deadly weapon (counts one, two, and three). Tree argues these sentences violate A.R.S. § 13-116, which is the statutory prohibition against double punishment. "We review *de novo* a trial court's decision to impose consecutive sentences in accordance with A.R.S. § 13-116." *State v. Urquidez,* 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006).

¶5 Tree maintains all of these offenses involved the same firearms and the same sequence of events, and that the victims did not suffer any additional risk of harm as a result of the weapons misconduct offenses. *See State v. Hampton,* 213 Ariz. 167, ¶ 64, 140 P.3d 950, 965 (2006) (trial court cannot impose consecutive sentences "when the defendant's conduct is a 'single act'"), *quoting State v. Gordon,* 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989). We agree, and

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[2]We recognize that neither defense counsel nor the prosecutor raised the sentencing errors that are the subject of this appeal. Nonetheless, we commend appellate counsel for their succinct presentations and appropriate concessions. *See* ER 3.3, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42.

[3]Although Tree states the trial court erroneously imposed concurrent sentences, it is clear he intended to say the sentences imposed were consecutive.

the state concedes the imposition of consecutive sentences as to these counts was error.

¶6 Tree logically could not have committed first-degree burglary or have placed the victims in "reasonable apprehension of imminent physical injury" by pointing the handguns at them without possessing the handguns. *See* A.R.S. §§ 13-1203(A)(2), 13-1204(A)(2), 13-1508(A). And, the evidence establishing he did so was the same evidence that established he possessed the handguns. Thus, the conduct constituted a single act for purposes of § 13-116 and *Gordon,* 161 Ariz. at 315, 778 P.2d at 1211. Accordingly, we vacate the sentences for counts four and five. Because the record does not reveal whether the sentencing judge would have imposed the same sentences if it had considered § 13-116, we direct only that the sentences for those counts be concurrent with the sentences for counts one, two, and three. *See State v. Hardwick*, 183 Ariz. 649, 656–57, 905 P.2d 1384, 1391–92 (App. 1995) (remand appropriate when record unclear whether sentencing judge would have imposed different sentence when not considering improper factor).

¶7 For the foregoing reasons, we affirm Tree's convictions, direct the trial court to correct the sentences for counts six and seven to reflect presumptive sentences of 2.25 years, vacate the sentences for counts four and five, and remand for resentencing on those counts. Whatever sentences the court imposes on counts four and five, they shall be served concurrently with the sentences for counts one, two, and three. Tree's sentences on the remaining counts are affirmed.