

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ROSARIO IGNACIO SOTO JR.,
Appellant.

No. 2 CA-CR 2014-0085
Filed June 19, 2015

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NOT FOR PUBLICATION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.

Appeal from the Superior Court in Pima County
No. CR20121143001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART, AND REMANDED

COUNSEL

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MEMORANDUM DECISION

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

ECKERSTROM, Chief Judge:

¶1 After a jury trial, Rosario Soto Jr. was convicted of three counts of aggravated assault, two counts each of armed robbery and aggravated robbery, and one count each of attempted armed robbery, attempted aggravated robbery, first-degree burglary, possession of marijuana, and fleeing from a law enforcement vehicle. The jury further found that all but the last two offenses were dangerous offenses. The trial court, finding Soto had a previous conviction for a dangerous felony, sentenced him to concurrent and consecutive prison terms totaling 31.5 years.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting she has reviewed the record but found no arguable issue to raise on appeal. Consistent with *Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d at 97, she has provided “a detailed factual and procedural history of the case with citations to the record” and asks this court to search the record for error. In our review, we identified an arguable issue of fundamental error and ordered the parties to file supplemental briefs addressing whether the trial court erred in sentencing Soto as a repetitive, dangerous offender pursuant to A.R.S. § 13-704(D).¹ See *Penson v. Ohio*, 488 U.S. 75, 83-84 (1988) (briefing on arguable issue required); *State v. Gonzalez*, 216 Ariz. 11, ¶ 2, 162 P.3d 650, 651 (App. 2007) (“The imposition of an illegal sentence is fundamental error.”).

¹We cite the current versions of all statutes referred to in this decision, as they have not changed in material part since Soto committed his offenses.

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¶3 Viewing the evidence in the light most favorable to sustaining the verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), sufficient evidence supports the jury's verdicts. In March 2012, Soto and two other individuals entered a home, threatened the three occupants with firearms, and stole property including marijuana; the three men were apprehended after their vehicle crashed while fleeing law enforcement officers in marked vehicles. *See* A.R.S. §§ 13-105(13), 13-1001(A), 13-1203(A)(2), 13-1204(A)(2), 13-1507(A), 13-1508, 13-1902(A), 13-1903(A), 13-1904(A), 13-3405(A)(1), 28-622.01.

¶4 Sufficient evidence supported the trial court's finding that Soto had a previous conviction for a dangerous offense. That conviction was for attempted aggravated assault with a deadly weapon, a dangerous, class four felony. *See* §§ 13-1001(C)(3), 13-1204(A)(2), (D). Except for his conviction of attempted aggravated robbery, Soto's convictions for dangerous offenses in this case were for class two or class three felony offenses. *See* §§ 13-1001(C), 13-1204(D), 13-1508(B), 13-1903(B), 13-1904(B). The court sentenced him for those offenses pursuant to § 13-704(D). But that provision does not permit an enhanced sentence based on a previous dangerous class four felony; instead the previous dangerous felony must have been a class one, two, or three felony. Accordingly, the sentences imposed for Soto's convictions of armed robbery, aggravated robbery, aggravated assault, attempted armed robbery, and first-degree burglary are improper.² The prison terms imposed for Soto's remaining convictions are within the statutory limit and were imposed properly. *See* A.R.S. §§ 13-703(B), (I), 13-704(B), 13-1001(C)(3), 13-1903(B), 13-3405(B)(1), 28-622.01.

²In his supplemental brief, Soto asserts his previous conviction was for first-degree burglary classified as a dangerous offense. If that were so, the sentences for his dangerous class two or class three felonies would be correct. *See* §§ 13-704(D), 13-1508(B). Because we will not ignore fundamental error when we find it, *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007), and because the state concedes Soto must be resentenced, we decline to treat Soto's inaccurate reading of the record as a waiver of sentencing error.

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¶5 Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and found none save the sentencing error discussed above. *See State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) (*Anders* requires court to search record for fundamental error). Accordingly, we vacate the sentences imposed for Soto's convictions of dangerous class two and class three felony offenses and remand the case for resentencing on those convictions. We affirm Soto's convictions and remaining sentences.