

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

VANCE JOHNSON,
Appellant.

No. 2 CA-CR 2014-0136
Filed March 30, 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NOT FOR PUBLICATION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 Pinal County
No. CR201201686
The Honorable Joseph R. Georgini, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

COUNSEL

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STATE v. JOHNSON
Decision of the Court

MEMORANDUM DECISION

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

K E L L Y, Presiding Judge:

¶1 Following a jury trial, Vance Johnson was convicted of one count of dangerous or deadly assault by a prisoner. The jury found the state had proven several aggravating circumstances. The trial court sentenced Johnson to an enhanced, aggravated term of imprisonment of twenty-eight years. On appeal, Johnson argues the court abused its discretion by not precluding evidence regarding the weapon allegedly used during the commission of the assault. He also asserts the court erred in allowing two essential elements of the offense to be presented to the jury as aggravating factors. For the following reasons, we affirm Johnson’s conviction, vacate his sentence, and remand for resentencing.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Johnson’s conviction and sentence. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In January 2009, Johnson was a prisoner at the Eyman Complex in Florence. During an altercation with other inmates, Johnson “lunge[d]” toward M.T., another inmate, with a clenched fist and struck him in the left side of his neck. Blood immediately spurted from M.T.’s neck. M.T. pushed Johnson away, but Johnson “swung a second time around with a closed fist . . . and tried to make contact” with M.T.’s ribs. Johnson then ran to his cell and closed the door. Prison officials later found a shank—a prison-made weapon with a sharpened end—in the plumbing underneath the toilet in Johnson’s cell.

¶3 Johnson was charged with dangerous or deadly assault by a prisoner and attempted first-degree murder. The jury found him guilty of the assault and acquitted him of attempted first-degree

STATE v. JOHNSON
Decision of the Court

murder, and the trial court sentenced him as described above. Johnson timely appealed.

Discussion

¶4 Johnson argues the trial court erred in denying his motion in limine to preclude evidence regarding the shank found underneath the toilet in his prison cell. We review the court's ruling for an abuse of discretion. *See State v. Gamez*, 227 Ariz. 445, ¶ 25, 258 P.3d 263, 267 (App. 2011).

¶5 In his motion in limine, Johnson asked the court to preclude the state's use of photographs and testimonial evidence relating to the shank because the state had lost the shank before Johnson was indicted. He asserted that, "[w]ithout the weapon present to view and/or test or for an expert to review, the Defense is completely unable to refute the evidence and the inference [that] it was used in the assault." The court denied the motion, stating preclusion was not the appropriate remedy. At the close of the evidence, the court instructed the jury, pursuant to *State v. Willits*, 96 Ariz. 184, 191, 393 P.2d 274, 279 (1964), that:

If you find that the State has lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues in this case, then you should weigh the explanation, if any, given for the loss, destruction or availability of the evidence. If you find that any such explanation is inadequate, then you may draw an inference unfavorable to the State, which in itself may create a reasonable doubt as to the defendant's guilt.

¶6 *Willits* requires judges to "instruct juries that if they find that the state has lost, destroyed or failed to preserve material evidence that *might* aid the defendant and they find the explanation for the loss inadequate, they may draw an inference that that evidence would have been unfavorable to the state." *State v. Youngblood*, 173 Ariz. 502, 506, 844 P.2d 1152, 1156 (1993). If the

STATE v. JOHNSON
Decision of the Court

evidence “*might* be exculpatory” and the absence of the evidence is not the result of “bad faith conduct,” a *Willits* instruction “more than adequately complies with the fundamental fairness component of Arizona due process.” *Id.* at 506-07, 844 P.2d at 1156-57. Thus, “an instruction is adequate where the state destroys, loses or fails to preserve evidence unless the state acts in bad faith or the defendant suffers prejudice-in-fact.” *Id.* at 507, 844 P.2d at 1157; *see also State v. Rivera*, 152 Ariz. 507, 511, 733 P.2d 1090, 1094 (1987) (defendant’s due process right protected by *Willits* instruction unless “the prejudice caused to the defendant is great” or state acted in bad faith); *see, e.g., State v. Tucker*, 157 Ariz. 433, 443, 759 P.2d 579, 589 (1989) (*Willits* instruction adequately protected defendant’s rights where destroyed partial latent fingerprints “would not have excluded [him] from ever having handled the [alleged murder weapon] and certainly would not exonerate [him] of the alleged crime”).

¶7 Johnson does not argue that the State’s loss of the shank was in bad faith. Instead, he claims he was harmed by the loss of the shank because he “had been invoking his Rule 8 right to a speedy trial” but waived time so that he could complete an analysis of the shank. The state, he asserts, did not inform him that the shank had been lost until six months after he began waiving time. However, Johnson does not explain how the delay in his trial harmed him. *Cf. State v. Wassenaar*, 215 Ariz. 565, ¶¶ 16, 20, 161 P.3d 608, 614, 615 (App. 2007) (to warrant reversal, defendant must show prejudice under Rule 8 or that he was denied a fair trial). We therefore reject that argument.

¶8 Next, Johnson asserts the loss of the shank resulted in the trial court’s preclusion of testimony from his “injury causation” expert, Dean Beers; without the shank, the court concluded Beers “was not able to provide the trial court with a reliable methodology for reaching his conclusion that the shank could not have caused the victim’s injuries.” The court stated that Beers “provided no testimony nor evidence that he applied any reliable principles nor methods to the facts of this case which [led] to his ultimate conclusion” but the court made no mention of the fact that Beers was unable to examine the shank. Johnson argues that if Beers had

STATE v. JOHNSON
Decision of the Court

been able to analyze the shank, he would have “looked for any damage to the shank, trapped tissue embedded in the shank, and who made the eyeglass fastener of the shank to determine the abilities or limitations of the fastener.” But Johnson has not explained how those steps would have made the principles and methods upon which Beers based his conclusion more reliable.

¶9 In addition, Johnson claims the *Willits* instruction did not remedy the harm to him because “the State was allowed to argue to the jury that the shank found in [his] toilet was in fact the weapon used on the victim” and he “had no ability to refute” that argument. However, closing arguments are not part of the presumptive record on appeal, *see* Ariz. R. Crim. P. 31.8(b)(2)(ii), and it was Cordova’s counsel’s duty to “see that the record before us contains the material to which [he] takes exception,” *State v. Zuck*, 134 Ariz. 509, 512-13, 658 P.2d 162, 165-66 (1982). Because Johnson has not provided us with the transcript of the closing arguments, we cannot assess whether he was harmed by the state’s argument. Moreover, the *Willits* instruction permitted the jury to infer what the shank could have proved—that it was not capable of inflicting the injuries on M.T. *See Tucker*, 157 Ariz. at 443, 759 P.2d at 589. “Under these circumstances, . . . where the *Willits* instruction provided the same benefit as any independent examination of the evidence, the *Willits* instruction protected [Johnson’s] right to a fair trial.” *See id.*

¶10 Johnson further maintains that evidence concerning the shank should have been precluded because it was not relevant. He concedes he did not raise this argument below; accordingly, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Johnson does not argue in his opening brief that the alleged error was fundamental. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). He does raise the argument in his reply brief, but “[a]rguments raised for the first time in a reply brief . . . are waived.” *State v. Brown*, 233 Ariz. 153, ¶ 28, 310 P.3d 29, 39 (App. 2013). Therefore, we do not consider this argument further. We conclude that Johnson has not established the “great prejudice” required for us to conclude that the *Willits* instruction did not adequately protect his right to a fair trial.

STATE v. JOHNSON
Decision of the Court

Elements of Offense as Aggravating Factors

¶11 Johnson argues the trial court erred in allowing two essential elements of the offense to be presented to the jury as aggravating factors. He asserts that “[i]f the jury had not found those two aggravators and the trial court had not considered them, [he] may have received a lesser sentence.” Although we review a sentence imposed by the trial court for an abuse of discretion, we review *de novo* whether a particular aggravating factor is an element of the offense and whether the trial court can use such a factor in aggravation. *State v. Tschilar*, 200 Ariz. 427, ¶ 32, 27 P.3d 331, 339 (App. 2001).

¶12 At sentencing, Johnson objected to the trial court’s consideration of two of the aggravating factors found by the jury – that the offense involved “infliction or threatened [i]n infliction of serious physical injury” and “the use of, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crime” – because those factors were also elements of the offense. *See* A.R.S. § 13-1206. The state concedes, and we agree, that the court’s consideration of those factors as aggravating factors was improper. The state argues, however, that Johnson’s twenty-eight-year sentence is not illegal because it is within the aggravated range prescribed for a class two felony committed by a category three repetitive offender.¹ *See* A.R.S. §§ 13-1206, 13-703(C), (J). Because the court found six additional aggravating factors, including Johnson’s prior felony convictions, the state asserts “[i]t is clear that the trial court would have imposed an aggravated sentence if the two improper aggravators had not been used.”²

¹Johnson admitted at sentencing that he had three prior felony convictions.

²The court found as aggravating factors the presence of an accomplice, *see* § 13-701(D)(4), that the victim suffered physical and emotional harm, *see* § 13-701(D)(9), Johnson’s prior felony convictions, *see* § 13-701(D)(11), his attempt to conceal, hide or destroy evidence of the crime, his violation of a previous grant of probation, and his time served in prison.

STATE v. JOHNSON
Decision of the Court

¶13 The state essentially urges us to conclude that the trial court's improper use of essential elements of the offense as aggravating factors was harmless error. "When a trial court relies on both proper and improper factors in aggravating a sentence, this court will uphold its decision 'only where the record clearly shows the trial court would have reached the same result even without consideration of the improper factors.'" *State v. Hardwick*, 183 Ariz. 649, 656-57, 905 P.2d 1384, 1391-92 (App. 1995), quoting *State v Ojeda*, 159 Ariz. 560, 562, 769 P.2d 1006, 1008 (1989).

¶14 Here, the trial court was required to impose an aggravated sentence because it found aggravating circumstances and did not find any mitigating circumstances. See A.R.S. § 13-701(F). But that means only that the court was required to impose a sentence greater than the presumptive sentence of 15.75 years. See A.R.S. § 13-703(J); *State v. Wagner*, 194 Ariz. 1, ¶ 9, 976 P.2d 250, 253 (App. 1998), vacated in part on other grounds, 194 Ariz. 310, 982 P.2d 270 (1999) (judge may "impose a term greater than the presumptive up to a specified maximum, or a term less than the presumptive down to a specified minimum, upon a finding and weighing of statutorily defined aggravating or mitigating circumstances"). The court here imposed the maximum sentence, twenty-eight years, after finding there were no mitigating factors and "[t]he aggravating factors substantially outweigh any mitigating factors." But it did not indicate how much weight it assigned to any particular aggravating factor. We cannot say it is certain that the court would have imposed the maximum sentence, if it had not considered two elements of the offense as aggravating factors. Accordingly, we must vacate Johnson's sentence and remand for resentencing. See *State v. Johnson*, 229 Ariz. 475, ¶ 20, 276 P.3d 544, 551 (App. 2012) (remanding for resentencing where trial court relied on improper aggravating factors and record did not "demonstrate that the court would necessarily impose the same sentence after appropriately reconsidering the erroneously found aggravating factors").

Disposition

¶15 For the foregoing reasons, we affirm Johnson's conviction, vacate his sentence, and remand for resentencing.