

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

WAYNE E. COATES,
Appellant.

No. 2 CA-CR 2014-0175
Filed March 31, 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NOT FOR PUBLICATION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 Santa Cruz County

No. CR11171

The Honorable Monica L. Stauffer, Judge

AFFIRMED

COUNSEL

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Joseph T. Maziarz, Section Chief Counsel, Phoenix
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Counsel for Appellee

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STATE v. COATES
Decision of the Court

MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Appellant Wayne Coates appeals from the trial court's order revoking his probation and sentencing him to 1.5 years imprisonment after the court found he had committed multiple probation violations. On appeal, Coates argues the evidence was insufficient as a matter of law to support the violation findings, and that the court abused its discretion by failing to recuse itself after receiving extrajudicial communications and by imposing a maximum sentence. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the trial court's findings of a probation violation. *State v. Vaughn*, 217 Ariz. 518, n.2, 176 P.3d 716, 717 n.2 (App. 2008). In 2012, Coates pled guilty to one count of aggravated harassment, a class six undesignated felony, and one count of interfering with judicial proceedings, a class one misdemeanor, for incidents that occurred in Santa Cruz County involving his former neighbors. Coates admitted he had violated an injunction against harassment by coming within proscribed distances of the victims on two occasions. In March 2012, the trial court "suspend[ed] the imposition of sentence" and placed Coates on unsupervised probation for two years pursuant to the plea agreement. As a condition of probation, Coates was to "[r]emain a law abiding citizen to include obeying any [i]njunctions in place."

¶3 About a year before his term of probation had begun, Coates moved to a rural subdivision in Yavapai County. Coates's probation was without incident until the spring of 2013, shortly after he joined the board of directors of the homeowners association (HOA) in his new community.

STATE v. COATES
Decision of the Court

¶4 In March 2014, the state filed a petition to revoke probation, which alleged Coates had violated the conditions of probation by committing several acts of “disorderly conduct and/or harassment” on three separate occasions in his new neighborhood. Two of the incidents involved Coates’s neighbor and co-board member, Z., and the third incident involved D., a friend of another neighbor.

¶5 At a probation violation hearing, Z. testified that on May 26, 2013, he was “walking on a private road within the subdivision” when he encountered Coates, who appeared to be “doing his jogging routine.”¹ As Coates passed by on the opposite side of the thirty foot roadway, Z. greeted him, saying “Good morning,” to which Coates replied, “Were you born a mother f---ing a--hole or did you just become a mother f---ing a--hole[?]” Coates then “repeated ‘[m]other f---ing a--hole’ again” as he continued on.² When asked about Coates’s physical appearance and demeanor, Z. testified he “was attired for [his jogging routine],” and that Coates “didn’t really look at [him] at all, he just kind of mouthed, just kind of shrieked these obscenities and continued on his run.” Z. stated he was “stunned or shocked, harassed, and . . . felt threatened by it because . . . of the violence of the expression.”

¶6 The next incident occurred on December 17, 2013, again when Z. encountered Coates during his walk. On this occasion, Z. “didn’t say anything to [Coates],” and as Coates ran past Z. he said, “Well, you proved what a f---ing a--hole you were last night.”³ Z.

¹Z. also testified that Coates’s wife was jogging approximately thirty feet behind Coates.

²A few days before the May 26 incident, a contentious email exchange occurred between Coates and the other HOA board members. Coates was apparently upset because he had learned that Z. told a neighbor that Coates had “turned [that neighbor] in” for an HOA violation.

³The preceding night, Z. and his wife had attended a “dining club dinner” with another couple. When they arrived at the club, they learned they “had been assigned to a table with . . . Coates and

STATE v. COATES
Decision of the Court

responded, ““You cannot talk to me any more like that, you cannot swear at me like that. If it keeps up, I am going to call the sheriff.”” Coates did not respond and “just continued to run.” Z. testified that Coates’s “voice was elevated, harsh, loud, almost shrieking, similar to the [May] incident.” Z. did not report either of these incidents until February 2014, stating he had “decided . . . not to report it to the police unless there was another incident.”⁴

¶7 At the end of the hearing, the trial court found the state had proved by a preponderance of the evidence that Coates “violated a term and condition [of probation] requiring that he obey all laws.” Specifically, the court determined Coates had committed disorderly conduct under A.R.S. § 13-2904(A)(3) and harassment under A.R.S. § 13-2921(A)(1) on May 26, and his conduct during the December 17 incident constituted harassment under § 13-2921(A)(1). The court ordered the probation department to prepare a predisposition report and set a disposition hearing.

¶8 At the disposition hearing, the state recommended that probation be extended and converted to supervised probation with an initial period of incarceration. Coates’s probation officer recommended that probation be terminated as unsuccessful and that the aggravated harassment charge be designated a felony. The trial court revoked probation and sentenced Coates to a maximum, 1.5-year prison term. In doing so, the court found two aggravating factors: “the emotional harm and pain” inflicted upon B., the underlying victim, and Coates’s “continued acts of harassment and disorderly conduct.” Coates filed a timely notice of appeal. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A). *See State v. Regenold*, 226 Ariz. 378, ¶¶ 8-9, 249 P.3d 337,

his wife.” After someone in Z.’s party informed the manager they “would not sit at the same table with [Coates],” Coates and his wife were moved to another table.

⁴The third incident involving D. is not at issue on appeal. The trial court found that Coates’s behavior during the incident involving D., though offensive, did not “rise[] to the level of a violation of the law.”

STATE v. COATES
Decision of the Court

338-39 (2011) (pleading defendant whose probation later revoked following contested revocation hearing may directly appeal resulting sentence).

Discussion

¶9 On appeal, Coates argues the trial court erred by denying his “Motion[s] for Judgment of Acquittal” as to the disorderly conduct and harassment charges because the evidence presented at the probation violation hearing was insufficient to establish by a preponderance of the evidence that he had committed such crimes. He also contends the court abused its discretion by failing to recuse itself after receiving extrajudicial communications and by sentencing him to an aggravated term of imprisonment.

Sufficiency of the Evidence

¶10 A violation of probation must be established by a preponderance of the evidence. Ariz. R. Crim. P. 27.8(b)(3). We will uphold a trial court’s finding that a probationer violated the terms of probation ““unless the finding is arbitrary or unsupported by any theory of evidence.”” *Vaughn*, 217 Ariz. 518, ¶ 14, 176 P.3d at 719, quoting *State v. Thomas*, 196 Ariz. 312, ¶ 3, 996 P.2d 113, 114 (1999).⁵

¶11 Coates argues the trial court erred in finding he had committed harassment in violation of § 13-2921(A)(1) on May 26 and December 17 because no evidence was presented “from which the

⁵Coates contends his “claims related to the probation violation findings are subject to de novo review” because he is “challeng[ing] the legal sufficiency of the evidence . . . and the denial of his rule 20 motion.” Though Coates correctly notes we review Rule 20 motions de novo, see *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011), he offers no authority to support his apparent position that Rule 20 motions are a proper procedural tool in probation revocation proceedings, and we are aware of none, see generally *State v. Jurado*, 157 Ariz. 215, 217, 755 P.2d 1203, 1205 (1988) (probation violation hearing does not take on character of criminal prosecution when alleged violation involves breaking a particular law, and separate procedures apply).

STATE v. COATES
Decision of the Court

... court could conclude that [he] intended to harass Z[.] or knew that he was harassing [Z.],” that no “reasonable person would . . . be harassed by the utterances, and the utterances d[id] not amount to fighting words or threats.”

¶12 A person commits harassment when, “with intent to harass or with knowledge that the person is harassing another person . . . [a]nonymously or otherwise contacts, communicates or causes a communication with another person . . . in a manner that harasses.” § 13-2921(A)(1). “[H]arassment” means conduct “directed at a specific person . . . that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person.” § 13-2921(E). Criminal liability under § 13-2921(A)(1) “is based on the ‘manner’ in which certain communication is conveyed and the underlying purpose for the communication,” which must be made “with the specific ‘intent to harass.’” *State v. Brown*, 207 Ariz. 231, ¶ 10, 85 P.3d 109, 113 (App. 2004), *quoting* § 13-2921(A).

¶13 A preponderance of evidence in the record supports the trial court’s finding that Coates had committed harassment against Z. in violation of his probation terms. That evidence showed Coates had exchanged “hundreds” of electronic mail messages with the HOA board of directors, most of which were of a “contentious” nature, regarding complaints he had made in the past because he was experiencing ongoing frustration with the board, of which Z. was a member. The evidence also showed he had engaged in a similar pattern of behavior in his previous community, evidence which was admissible at the violation hearing. *See* Ariz. R. Crim. P. 27.8(b)(3) (in determining whether violation occurred, “court may receive any reliable evidence not legally privileged, including hearsay”). Although this was not direct evidence of Coates’s intent to harass Z., the trial court could properly infer his intent based on all of the evidence, including the messages Coates sent to his co-board members evincing his frustration with Z. over his handling of a violation reporting issue. *See Phx. Newspapers, Inc. v. Dep’t of Corr.*, 188 Ariz. 237, 245, 934 P.2d 801, 809 (App. 1997) (“[I]ntent to harass may be established by circumstantial evidence.”); *see also* Ariz. R. Evid. 404(b) (prior acts admissible as proof of knowledge or intent).

STATE v. COATES
Decision of the Court

¶14 The record also supports a finding that a reasonable person would be seriously annoyed, alarmed, or harassed by the conduct, and that Z. was in fact, seriously annoyed, alarmed, or harassed. Z. testified he was “stunned by the viciousness of [Coates’s] remarks” on both occasions and “felt the language was threatening.” After his interactions with Coates, Z. changed his “walking habits” because he was afraid that Coates’s behavior “could lead to violence” or “retaliation against [him] . . . in the future.” Z. further testified he had not wanted to sit at the same table as Coates on December 16 because he was “afraid that any conversation [h]e might have [had]” with Coates could have “w[ou]nd up being used against [him] . . . in another board complaint or some other way.” Z. also stated that “other people who ha[d] not ever filed incident reports . . . ha[d] mentioned that they were afraid of . . . Coates.”

¶15 The court found Z. credible and that he was “agitated by the comments and . . . felt threatened and in fear as a result of . . . Coates’[s] behavior and comments based upon his tone and his words.”⁶ The evidence further supports a finding that a reasonable person would feel seriously alarmed, annoyed or harassed by the encounters. We therefore conclude the evidence presented at the probation violation hearing was sufficient to establish by a

⁶Coates also contends he is entitled to First Amendment protection because the only conduct the state sought to punish was “the fact of communication.” But harassment—even when taking the form of speech—is not communication, and, thus, is not entitled to constitutional protection. *See Brown*, 207 Ariz. 231, ¶ 8, 85 P.3d at 112 (prohibiting harassment not prohibiting speech because harassment not protected speech). The record clearly supports a finding of harassment based on Coates’s conduct. Though the language used was clearly offensive, Z. testified it was the manner in which Coates conveyed the speech that caused him to feel “stunned . . . shocked . . . harassed,” specifically noting the “violence of [Coates’s] expression” and the “anger behind his tone,” which “seemed scary to [him].”

STATE v. COATES
Decision of the Court

preponderance of the evidence that Coates committed harassment under § 13-2921(A)(1).⁷

Judicial Misconduct

¶16 Coates next contends the trial court should have recused itself pursuant to Rules 2.9 and 2.11, Ariz. Code of Jud. Conduct, Ariz. R. Sup. Ct. 81, because it received and considered extrajudicial communications, and other circumstances arose “provid[ing] grounds to reasonably question [its] impartiality.” The state argues Coates’s has waived his judicial bias argument as to “all but fundamental and prejudicial error” because he failed to raise it below.

¶17 The trial court received two facsimiles from an HOA board member in February 2014, and a letter from B., the underlying victim, in early March 2014. One of the February facsimiles contained a letter from the board of directors alleging Coates was responsible for “incidents eerily reminiscent of the events that occurred in the last community [he] lived in.” The second February facsimile contained copies of electronic mail messages relating to the May 26 and December 17 incidents.⁸ Upon receiving these materials, the court notified all parties, entered them into the court record, and set a probation status hearing for March 6, 2014. Despite having had knowledge of the extrajudicial communications and their content as early as February 2014, Coates never objected to the facsimiles or raised any claim of judicial bias below. Accordingly,

⁷Because the evidence supports the trial court’s findings that Coates committed acts of harassment on two separate occasions, and it is clear from the record that the court “would have reached the same result” at sentencing without considering the disorderly conduct charge, *see State v. Ojeda*, 159 Ariz. 560, 562, 769 P.2d 1006, 1008 (1989), we need not address the sufficiency of the evidence in regard to that charge.

⁸It also contained a police report relating to the third incident, which was dismissed.

STATE v. COATES
Decision of the Court

we agree with the state that he has waived his judicial bias claim as to all but fundamental, prejudicial error.⁹ See *State v. Granados*, 235 Ariz. 321, ¶ 13, 332 P.3d 68, 73 (App. 2014) (failure to object on basis of trial judge's bias below by filing motion and affidavit pursuant to Rule 10.1, Ariz. R. Crim. P., forfeits review for all but fundamental, prejudicial error).

¶18 To obtain relief under the fundamental error standard of review, Coates must establish that a fundamental error occurred and resulted in prejudice. See *State v. Kinney*, 225 Ariz. 550, ¶ 12, 241 P.3d 914, 919 (App. 2010). Fundamental error is such “going to the foundation of the case,” which takes away “a right essential to [the] defense” and is “of such magnitude that the defendant could not possibly have received a fair trial.” *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Though Coates alleges the trial court considered extrajudicial information in violation of Rule 2.9(A), he has failed to allege that doing so constituted fundamental error. See *id.* (burden of persuasion on defendant). Nor has he explained how he has been prejudiced by the court's alleged consideration of the facsimiles, which contained information substantially similar to that which the court received from other sources that were not ex parte. Since Coates does not argue that the alleged error is fundamental, and we find no error that can be so characterized, the argument is waived. See *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (failure to argue error was fundamental waives

⁹Coates additionally argues “failure of a trial judge to recuse themselves [sic] under Rule 2.9(A) and 2.11(A) of the Ariz. Code of Jud. Conduct constitutes structural error.” Though some forms of judicial bias can constitute structural error, “the defendant must allege a type of bias that would implicate his due process rights, such as bias based on a ‘direct, personal, substantial pecuniary interest,’ in order to constitute such error.” *State v. Granados*, 235 Ariz. 321, ¶ 11, 332 P.3d 68, 72 (App. 2014), quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). No such bias has been alleged here. See *id.* (other types of judicial bias, such as personal bias or prejudice do not invoke structural error review).

STATE v. COATES
Decision of the Court

argument); *cf. State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (we will not ignore fundamental error when found).

Sentencing

¶19 Coates next argues the trial court abused its discretion by imposing a prison sentence of 1.5 years “for his first probation violation.” The state asserts Coates has waived the argument “as to all but fundamental and prejudicial error” because he did not “challenge the legality of the sentence below on any ground.” Citing *State v. Vermuele*, 226 Ariz. 399, 249 P.3d 1099 (App. 2011), Coates replies he has not forfeited his sentencing claims because he “had no opportunity to challenge the errors that did not become apparent until [his] sentenc[e] was pronounced.” We agree. *See id.* ¶ 9 (failure to challenge sentence below as excessive cannot be fairly characterized as waiver due to lack of clear procedural opportunity to do so before it becomes final).

¶20 When a trial court revokes probation, it has broad discretion to determine an appropriate sentence so long as it “impose[s] a sentence because of the original offense.” *State v. Baum*, 182 Ariz. 138, 139-40, 893 P.2d 1301, 1302-03 (App. 1995). We will not disturb a sentence within the appropriate statutory range unless there appears an abuse of discretion. *Vermuele*, 226 Ariz. 399, ¶ 15, 249 P.3d at 1103.

¶21 Coates contends, without authority, that the trial court erroneously imposed a maximum sentence because it failed to consider “less onerous . . . sanctions” for his “first and only petition to revoke,” and the court’s sentence was “grossly discrepant from the State’s recommendation . . . and the probation department’s recommendation.” We find this argument unpersuasive because a court is not required to consider less onerous sanctions for a first probation violation. *See State v. Stotts*, 144 Ariz. 72, 87-88, 695 P.2d 1110, 1125-26 (1985) (no abuse of discretion in revoking probation and imposing maximum sentence after first petition for revocation).

¶22 Nor can we agree the trial court’s sentence was “grossly discrepant” from the sentencing recommendations of the state and the probation department. Notably, they both offered conflicting

STATE v. COATES
Decision of the Court

recommendations; the state suggested an initial “period of incarceration” followed by supervised probation, and the probation officer proposed termination because she believed Coates was no longer a good candidate for probation. The court’s imposition of a 1.5-year prison sentence was not unreasonable, particularly in light of the wide-ranging sentencing recommendations, and there is no authority or basis for characterizing it as “grossly discrepant” or an abuse of discretion.

¶23 Nor do the aggravating factors found by the trial court “evince an abuse of discretion” as Coates suggests. Again with no support, Coates contends the court improperly considered the emotional harm inflicted upon B., the underlying victim, because “there ha[d] been no contact between the two while [he] was on probation.” It is clear from the record, however, that the emotional harm the court referred to was the harm Coates had previously inflicted upon B. and his family through his actions leading to his conviction for aggravated harassment—not any subsequent actions on his part. Further, it was entirely proper for the court to consider emotional harm caused to the victim because it is an enumerated aggravating factor for sentencing purposes. A.R.S. § 13-701(D)(9) (emotional harm to victim factor court “shall consider” in imposing sentence). Moreover, the court’s finding of emotional harm was reasonably supported by B.’s statements during Coates’s original sentencing hearing and at the probation revocation proceedings. *See State v. Ponsart*, 224 Ariz. 518, ¶ 15, 233 P.3d 631, 635 (App. 2010) (we defer to trial court’s factual findings supported by record and not clearly erroneous).

¶24 Finally, the sentence imposed was within the statutory range, *see* A.R.S. § 13-702(D) (1.5 years maximum sentence for first-time offenders convicted of class-six felony), and the probation violations were similar in nature to the underlying offenses, *see Baum*, 182 Ariz. at 140, 893 P.2d at 1303 (probation violation may be aggravating sentencing factor if demonstrates defendant’s failure to “avail himself of the opportunity to reform”), *quoting State v. Rowe*, 116 Ariz. 283, 284, 569 P.2d 225, 226 (1977).

STATE v. COATES
Decision of the Court

Disposition

¶25 For the foregoing reasons, the trial court's finding that Coates had violated his terms of probation and its order revoking probation are affirmed.