

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

---

THE STATE OF ARIZONA,  
*Appellee,*

*v.*

ANTHONY CONNUE SERRANO,  
*Appellant.*

No. 2 CA-CR 2014-0233  
Filed October 21, 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NOT FOR PUBLICATION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. CR20103186001  
The Honorable Richard S. Fields, Judge  
The Honorable Deborah Bernini, Judge

**AFFIRMED IN PART; VACATED IN PART**

---

COUNSEL

Thomas C. Horne, Arizona Attorney General  
Joseph T. Maziarz, Section Chief Counsel, Phoenix  
By Jonathan Bass, Assistant Attorney General, Tucson  
*Counsel for Appellee*

STATE v. SERRANO  
Decision of the Court

Lori J. Lefferts, Pima County Public Defender  
By Frank P. Leto, Assistant Public Defender, Tucson  
*Counsel for Appellant*

---

**MEMORANDUM DECISION**

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

---

M I L L E R, Presiding Judge:

¶1 Anthony Serrano was convicted after a jury trial of unlawful imprisonment, assault, and sexual abuse. He was sentenced to concurrent maximum terms of imprisonment, the longest of which was six years. Serrano contends the trial court erred by precluding evidence the victim previously had falsely alleged sexual misconduct in an unrelated matter. In the alternative, Serrano contends Arizona's rape shield law is unconstitutional. For the following reasons, we affirm Serrano's convictions and sentences but vacate his criminal restitution order.

**Factual and Procedural Background**

¶2 We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against the defendant. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In July 2010, Serrano entered a fast-food restaurant and greeted his former co-workers, including victim B.G. After briefly conversing with B.G., Serrano pulled her into the men's restroom where he tried to kiss her, but B.G. resisted. Serrano then put his hand on B.G.'s neck and lifted her up against the wall, groping her and trying to put his hand down her pants. When Serrano released his grip on B.G.'s neck, she slumped to the floor and Serrano attempted to engage her in an act of oral sexual contact.

¶3 The jury found Serrano guilty and he was sentenced as described above on April 5, 2012. The state filed a motion for clarification and a hearing was held on April 24, 2012. At the

STATE v. SERRANO  
Decision of the Court

hearing, Serrano asked the trial court to extend the time to file a notice of appeal and the court granted the request. Serrano filed a notice of appeal on May 2, 2012, more than 20 days after the entry of judgment and sentence. *See State v. Serrano*, 234 Ariz. 491, ¶ 16, 323 P.3d 774, 779 (App. 2014).

¶4 In May 2014, we issued an opinion vacating the trial court's post-sentencing order that modified Serrano's sentence. *See id.* ¶ 1. In addition, we dismissed Serrano's appeal from his convictions and sentences, after determining the original notice of appeal was untimely. *Id.* ¶ 16. Serrano filed a motion for delayed appeal, which the trial court granted. Thus, Serrano again appeals to this court from his convictions and sentences pursuant to Rules 31.3(b) and 32.1(f), Ariz. R. Crim. P. *See State v. Whitman*, 234 Ariz. 565, n.2, 324 P.3d 851, 854 n.2 (2014); *see also Serrano*, 234 Ariz. 491, n.1, 323 P.3d at 775 n.1. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

**B.G.'s Prior Allegation of Indecent Exposure**

¶5 Serrano first argues the trial court erred in precluding evidence pertaining to B.G.'s prior allegation that a former supervisor exposed himself to her. As explained further below, Serrano failed to preserve this argument at trial; therefore, he forfeited appellate review of the issue for all but fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶6 Section 13-1421(A), A.R.S., prohibits the admission of "[e]vidence relating to a victim's reputation for chastity and opinion evidence relating to a victim's chastity." But it does permit "[e]vidence of false allegations of sexual misconduct made by the victim against others" if relevant and not outweighed by its inflammatory or prejudicial effect. § 13-1421(A). The standard of admissibility is by clear and convincing evidence. § 13-1421(B).

¶7 Before trial, the state moved to preclude as irrelevant any mention of a prior incident involving B.G. in which a supervisor allegedly exposed himself to her while she worked at another fast-food restaurant. In response, Serrano contended that he was investigating whether the incident constituted a false allegation of

STATE v. SERRANO  
Decision of the Court

sexual misconduct. Judge Bernini granted Serrano a pretrial hearing pursuant to § 13-1421.

¶8 Before the hearing, Serrano disclosed the following: (1) the incident involved B.G. and her supervisor, who denied the allegations; (2) a fellow co-worker walked into the back room when the alleged misconduct took place but did not corroborate B.G.; (3) the allegations were investigated by the restaurant, which deemed them uncorroborated; (4) the civil rights division of the Attorney General's Office filed a complaint on B.G.'s behalf; and, (5) the litigation was settled by consent judgment, in which the restaurant agreed to change employment practices and to a monetary settlement.

¶9 In response, the state disclosed: (1) the litigation was for wrongful termination, not sexual harassment, because the restaurant had fired B.G. and deemed her ineligible for rehire; (2) the restaurant's investigation had not concluded that the allegations were false, but that "there was a 'situation' between" B.G. and her supervisor; (3) according to B.G., the co-worker did not corroborate the allegations only because the supervisor had covered his genitals when he heard the co-worker enter the room; (4) the restaurant agreed to have a court-appointed trainer provide mandatory sexual harassment training for all employees; (5) the restaurant replaced its employee who investigated the sexual harassment claims; (6) the restaurant removed from B.G.'s work file mention of the allegation, her termination, and ineligibility for rehire; and, (7) the monetary settlement was merely B.G.'s back wages that had been lost due to the wrongful termination.

¶10 At the hearing, Serrano informed Judge Bernini that he had tried unsuccessfully to interview and subpoena the supervisor who allegedly had exposed himself to B.G. Serrano argued the supervisor's denial that he exposed himself to B.G. would be enough to satisfy the burden of proof. Judge Bernini did not find by clear and convincing evidence that there was a prior false claim of sexual misconduct by B.G. She explained that her ruling would likely not change as a result of the supervisor's testimony, but that Serrano could make an offer of proof, either after the supervisor was willing

STATE v. SERRANO  
Decision of the Court

to consent to an interview or in “the form of a brief hearing where he testifies for purposes of a final finding on this matter.”

¶11 During trial and outside of the jury’s presence, Serrano explained to Judge Fields the context of Judge Bernini’s pretrial ruling. He conceded Judge Bernini’s order to preclude the evidence had been correct because he “couldn’t find the witnesses that were involved in the [prior] incident so [he] could never make a record and come up with clear and convincing evidence.” Serrano’s counsel stated, “So [Judge Bernini] said, you know, you can’t bring it in, which I agree. It’s a totally correct ruling under the statute.”

¶12 Serrano now argues on appeal that the trial court erred in precluding evidence that B.G. had “falsely accused” a former supervisor of indecent exposure. Because Serrano did not preserve his claim of error at trial, it is forfeited for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607; *State v. Totress*, 107 Ariz. 18, 20, 480 P.2d 668, 670 (1971) (trial court must be given opportunity to correct errors at trial). Furthermore, because Serrano does not argue on appeal that fundamental error occurred, the argument is waived.<sup>1</sup> *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

¶13 And even assuming the argument was not waived, it is without merit. Contrary to Serrano’s assertion, the record shows that Judge Bernini’s ruling relied not only on the supervisor’s denial of B.G.’s allegation, but also on all the material presented by the

---

<sup>1</sup> Serrano states in his brief that “[a]ny claim not adequately preserved below is fundamental error.” But this statement alone is insufficient. Serrano fails to develop any argument that the trial court’s preclusion of evidence was prejudicial – that the error went to the foundation of the case and was of such magnitude that he could not possibly have received a fair trial. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607; *State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) (“[m]erely mentioning an argument is not enough” to avoid waiver); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi) (“proper standard of review on appeal shall be identified, with citations to relevant authority”).

STATE v. SERRANO  
Decision of the Court

parties. The record contains no evidence to support Serrano's claim that the court ignored evidence that supported the supervisor's denial. Accordingly, we find no error, fundamental or otherwise.

¶14 Serrano further contends § 13-1421 is unconstitutional because it violates his right to confront and cross-examine witnesses, violates the constitutionally mandated separation of powers between the legislature and the courts, and infringes upon our supreme court's rulemaking powers. Serrano concedes he challenges the constitutionality of the statute for the first time on appeal, but appears to assert the issue is of such importance that we should address it. We may consider constitutional arguments raised for the first time on appeal. *See State v. Gilfillan*, 196 Ariz. 396, n.4, 998 P.2d 1069, 1074 n.4 (App. 2000). However, the arguments Serrano raises were considered and rejected in *Gilfillan*, and we see no reason to deviate from that decision. 196 Ariz. 396, ¶¶ 17-28, 998 P.2d at 1074-77.

**Criminal Restitution Order**

¶15 Although Serrano has not raised the issue on appeal, we find fundamental error associated with the trial court's criminal restitution order (CRO), and we will correct such error when it is apparent. *See* A.R.S. § 13-805; *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007). In its sentencing minute entry, the court ordered several fees and assessments, and 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 the defendant is in the Department of Corrections." The imposition of that order prior to the expiration of Serrano's sentence "'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). Accordingly, the CRO cannot stand.

**Disposition**

¶16 For the foregoing reasons, we affirm Serrano's convictions and sentences, but vacate his CRO.