

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

v.

MANUEL DAVID PEREZ-GUTIERREZ,

Appellant.

CR-23-0137-PR

Court of Appeals

No. 1 CA-CR 22-0268

Maricopa County Superior Court

No. CR2020-135003-001

**STATE OF ARIZONA'S
PETITION FOR REVIEW**

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I. Issue Presented for Review.

Whether the court of appeals erred when it declined to apply fundamental error review to a sentencing claim raised for the first time on appeal.

II. Introduction.

This Court has routinely applied fundamental error review to alleged sentencing errors raised for the first time on appeal. Defying this Court's established precedent, the court of appeals, in a split-decision published opinion, refused to apply fundamental error review to one such error, and instead employed automatic remand. In doing so, the majority opinion followed two previous court of appeals' opinions that conflict with this Court's precedent. This Court should grant review to overrule the court of appeals' conflicting opinions and reaffirm that alleged sentencing errors raised for the first time on appeal are reviewed for fundamental error. Furthermore, this Court should reverse the court of appeals' opinion because in applying fundamental error review to the facts present here, relief is not warranted.

III. Material Facts.

Appellant, Manuel Perez-Gutierrez, was convicted of two counts of sexual conduct with a minor under fifteen years of age and six counts of sexual conduct with a minor who is at least fifteen years of age. R.O.A. 82–89.

The convictions stemmed from Perez-Gutierrez’s sexual abuse of his wife’s half-sister, Anna,¹ shortly after the 11-year-old girl moved into their home. R.T. 4/6/22, at 18–19, 27–28. The abuse continued almost “every day” until she was 17 years old and told her sister what was happening. *Id.* at 27–34, 45, 74–75, 104–06. Each charged count, however, contained distinct, identifying facts, which clearly separated them by time, location, or circumstance. *Id.* at 27–33, 67, 75. Perez-Gutierrez admitted to police he had sex with Anna, but claimed he only started doing so “when she was about 16.” R.T. 4/7/22, at 134.

At sentencing, the presentence report recommended prison sentences for all eight counts to run consecutively. R.O.A. 102, at 7. The State, in its written recommendation, highlighted each count’s unique, identifying facts and recommended consecutive sentences on all counts. *Id.* at 12 (noting also that consecutive sentences were mandatory for only Counts 1 and 2). Anna’s sister detailed the emotional trauma and serious negative impacts Anna experienced as a result of Perez-Gutierrez’s constant abuse and requested the court impose “the maximum time possible to keep [their] safety and to prevent this abuse from occurring to any other minor.” *Id.* at 16.

¹ Anna is a pseudonym. *See* Ariz. R. Crim. P. 31.10(f) (requiring a victim identifier, such as a pseudonym, if the victim of a crime is a minor at the time of the offense).

At sentencing, the court noted all the information it considered, stating:

In preparing for sentenc[ing] the Court has read and reviewed the presentence report, its recommendation for prison on all counts consecutive, the victim's sister's statement that was submitted to the pre-sentence report, the State's written recommendation, the defendant's criminal history which is non[]existent prior to these offenses, I should say, as well as all the information heard during the trial held in this matter.

R.T. 5/18/22, at 5–6.

The court then asked if the State had anything to add. *Id.* The State again recommended that all counts run consecutively given the trauma caused to Anna. *Id.* at 6–7. The Court also followed up with defense, which argued for the least imprisonment possible under the sentencing structure because this was Perez-Gutierrez's first “problem with [the] law.” *Id.* at 8. Finally, the court asked Perez-Gutierrez if he had anything to say, to which he responded: “[E]verything is a lie.” *Id.*

The court ruled that probation was not appropriate for any of the counts and instead found the presumptive prison sentence for all counts appropriate. *See id.* at 8–10. Accordingly, the court sentenced Perez-Gutierrez to 20 years' imprisonment each for Counts 1 and 2 and 1-year terms of imprisonment each for Counts 3 through 8. *Id.* The court concluded by ordering all counts to run consecutively,

for a total of 46 years' imprisonment. *Id.* at 10; *see generally* A.R.S. § 13–705(P) (requiring mandatory consecutive imposition for Counts 1 and 2).²

After the pronouncement of the sentence, the court asked the parties if there was “[a]nything else.” R.T. 5/18/22, at 12. Both the prosecution and the defense said there was not. *Id.*

On appeal, Perez-Gutierrez claimed for the first time that the trial court erred by failing to provide reasons on the record for its imposition of consecutive sentences in accordance with A.R.S. § 13–711(A), which provides:

[I]f multiple sentences of imprisonment are imposed on a person at the same time, the sentences imposed by the court may run consecutively or concurrently, as determined by the court. The court shall state on the record the reason for its determination.

See Opening Brief (“O.B.”) at 22.

In response, the State argued: (1) the trial court complied with the requirements of A.R.S. § 13–711(A) by providing sufficient reasoning for its sentence determination; and (2) even assuming the statute was not satisfied, Perez-Gutierrez failed to meet his burden of establishing fundamental, prejudicial error. *See* Answering Brief (“A.B.”) at 10–19.

² The issue presented necessarily impacts the consecutive imposition of Counts 3–8, where the trial court maintained discretion. *See* A.R.S. § 13–711(A).

In a published, split-decision opinion, the court of appeals held that the trial court failed to comply with the requirements of A.R.S. § 13–711(A) and that fundamental error review should not be applied. *State v. Perez-Gutierrez*, No. 1 CA–CR 22–0268 (Ariz. App. May 9, 2023) (“Opinion”) at ¶ 16.

The majority opinion began its analysis by recognizing appellate courts generally “review an unobjected-to sentencing order for fundamental error[.]” Opinion at ¶ 6 (citing *State v. Escalante*, 245 Ariz. 135, 140, ¶ 12 (2018)). Nonetheless, relying primarily on a decades-old court of appeals’ decision—*State v. Anzivino*, 148 Ariz. 593 (App. 1985)—the majority concluded that Perez-Gutierrez was entitled to automatic remand without showing fundamental, prejudicial error occurred. Opinion at ¶¶ 16, 27.

The majority reasoned that the superior court’s failure to comply with the statutory requirement can “neither be inferred from a court’s order nor waived by a party[.]” and therefore it “does not fit neatly into [the] definition of fundamental error.” Opinion at ¶ 16 (citing *Anzivino*, 148 Ariz. at 598). Further, the majority rejected the notion that harmless error review would apply if Perez-Gutierrez had objected because sentencing is a “solemn event” and thus, defendants should not be expected to interrupt a trial court’s pronouncement to preserve their appeal. Opinion at ¶ 25 (citing *State v. Vermuele*, 226 Ariz. 399, 402, ¶ 8 (App. 2011)).

The dissent disagreed, stating that the court should “follow the same path [it does] in almost all criminal cases where error occurs in the superior court—apply harmless error review if a defendant objected and fundamental error review if he did not.” Opinion at ¶ 29 (Catlett, J., dissenting). The dissent highlighted that the automatic remand practice was a judicial creation which was last used nearly four decades ago. *Id.* at ¶¶ 31, 39 (noting “not a single appellate decision, published or unpublished, has applied [*Anzivino*’s] automatic-remand practice”).

Citing numerous precedents from this Court, the dissent also noted other mandatory statutory obligations and important constitutional errors that are likewise subject to fundamental error review when raised for the first time on appeal. *Id.* at ¶¶ 33, 46. And in contrast to other, more fact-intensive appellate issues, the binary aspect of sentencing someone to either concurrent or consecutive sentences lessens the need for a statement of reasons in order to conduct meaningful appellate review. *Id.* at ¶ 36 (explaining “we can readily determine on appeal whether convictions involve one or multiple acts”).

The dissent also noted that a primary justification for the majority’s conclusion—that the defendant seemingly had no opportunity to object because the error became obvious only during pronouncement of sentence—failed to hold water for a variety of reasons, including that it could not be squared with this Court’s precedent. *Id.* at ¶ 48. Thus, in applying automatic remand, the dissent

reasoned, the court elevated the failure to provide reasons on the record to structural error and conflicted with this Court's precedent. *Id.* at ¶ 47.

Finally, the dissent concluded, had the correct standard of review applied, Perez-Gutierrez could not establish fundamental error. *Id.* at ¶ 53.

IV. This Court should grant review because the court of appeals' majority opinion applied the incorrect standard of review for unpreserved sentencing errors in reliance upon court of appeals caselaw that conflicts with this Court's precedent.

In a published opinion, the court of appeals applied an incorrect standard of review for a sentencing issue raised for the first time on appeal. Under this Court's precedent, trial errors—including sentencing errors—that were not objected to at trial are reviewed for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005). Here, however, relying on outdated and conflicting court of appeals' decisions, the majority held that the trial court's failure to state sufficient reasons for imposing consecutive sentences warranted automatic remand. Opinion at ¶ 16. In so holding, the court of appeals exempted this particular type of error from typical sentencing error review and established conflicting precedent for future review of such errors. This Court should accept review, reverse the court of

appeals' decision, and reaffirm that fundamental error review applies to sentencing errors raised for the first time on appeal.³

A. In determining automatic remand was required, the court of appeals erroneously relied upon its own precedent in *Anzivino*, which is inconsistent with *Henderson*.

The trial court's failure to provide reasons on the record for its sentence determination in accordance with A.R.S. § 13–711(A) was not objected to in the trial court and thus should have been reviewed for fundamental error. Instead, the court of appeals incorrectly applied automatic remand based upon its own precedent in *Anzivino*. Because *Anzivino* is inconsistent with *Henderson* and its progeny, this Court should reverse the court of appeals' decision and find the claim subject to fundamental error review.

In *Anzivino*, the trial court did not sufficiently state its reasons for imposing consecutive sentences, as required by the former version of A.R.S. § 13–711(A). 148 Ariz. at 597. As is the case here, the defendant did not raise the issue at trial. *Id.* at 598. Nonetheless, the court of appeals held that fundamental error review should not apply because “failure to state grounds for imposing consecutive sentences does not fit neatly into [the] definition of fundamental error review.” *Id.*

³ The State does not seek review of the court of appeals' conclusion that the superior court failed to provide sufficient reasons for its sentence determination in accordance with A.R.S. § 13–711(A).

Instead, the court concluded, the mandatory nature of the statute required automatic remand after a finding of error. *Id.*

Now, in *Perez-Gutierrez*, the court of appeals relies upon *Anzivino* and defends its reasoning. Specifically, the majority contends that fundamental error review is not a “neat[] fit” because “the statutory requirement [to state reasons] can neither be inferred from a court’s order nor waived by a party.” Opinion at ¶ 16.

But *Anzivino* conflicts with this Court’s opinion in *Henderson*. *Henderson* addressed whether a sentencing error, unraised at trial, was properly reviewed under harmless error review. 210 Ariz. at 564–65, ¶¶ 8, 10. This Court noted that because the error did not “infect the entire trial process,” it was not structural error and should be reviewed under normal trial error analysis. *Id.* at 567, ¶ 17. Accordingly, harmless error review applied if the error was preserved and fundamental error review applied if the defendant failed to object. *Id.* at 567, ¶¶ 18–19. Because the defendant there did not object below, his sentencing claim was reviewed for fundamental error only. *Id.* at 568, ¶ 22.

Importantly, in reaching its conclusion in *Henderson*, this Court made clear: “To the extent that any prior appellate decisions are inconsistent with today’s holding, we disapprove of them.” *Id.* at 568, ¶ 21. Thus, because *Anzivino*’s holding mandating automatic remand is inconsistent with *Henderson*, it is implicitly disapproved by *Henderson* as well. *Id.*

To be certain, applying fundamental error review does not render A.R.S. § 13–711(A) a “dead letter.” *Cf. Anzivino*, 148 Ariz. at 598. To the contrary, the defendant will still receive meaningful review. For example, if a trial court were to incorrectly apply the law or suggest a limitation in the court’s discretion that did not actually exist, the defendant would likely prevail under fundamental error review. *See, e.g., State v. Garza*, 192 Ariz. 171, 174–76, ¶¶ 12, 18 (1998) (reversing sentencing error under previous version of A.R.S. § 13–711(A) where it was clear from the record the judge incorrectly believed the statute created a presumption for consecutive sentences, thereby limiting the court’s discretion).

Of course, prevailing under fundamental error review may be difficult, but such is the nature of that standard of review, which exists in part to incentivize making a timely objection so the trial court has an opportunity to cure an alleged error. *See Henderson*, 210 Ariz. at 567, ¶ 19 (discussing policy for placing burden on defendant under fundamental error review); *see also United States v. Dominguez Benitez*, 542 U.S. 74, 82–83 (2004) (stating that a higher burden is placed on defendants who do not object in the trial court “to encourage timely objections and reduce wasteful reversals”). And as is detailed further below in Section IV(B), timely objection is entirely possible in this context.

By mandating automatic remand, the majority opinion effectively transformed this particular type of sentencing error into structural error. Opinion at

¶ 47 (Catlett, J., dissenting). Structural errors, however, are extraordinarily rare and “deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence[.]” *State v. Ring*, 204 Ariz. 534, 552, ¶ 45 (2003). What occurred here was not structural error. *See id.* (noting “[m]ost errors [considered] on appeal, even those involving constitutional error, constitute trial errors”) (cleaned up).!

Consequently, the majority below erred when it followed its own outdated precedent and not this Court’s dictates in *Henderson* and its progeny.

B. The majority opinion’s reliance on another court of appeals’ opinion, *Vermuele*, is unavailing as *Vermuele* conflicts with this Court’s precedent.

The majority below also stated that fundamental error review should not be applied here because it would require “interrupt[ion] [of] the superior court’s sentencing pronouncement to preserve appeal.” Opinion at ¶ 25. This, the court reasoned, was contrary to its own precedent in *Vermuele*, 226 Ariz. at 402, ¶ 25. But as discussed below, *Vermuele* too conflicts with this Court’s precedent.

In *Vermuele*, the defendant argued that his natural life sentence was excessive and that the trial court failed to give adequate weight to the mitigation evidence. 226 Ariz. at 401, ¶ 5. Although the claim was raised for the first time on appeal, the court of appeals nonetheless concluded that waiver and forfeiture

principles did not apply because the “basis for [the sentencing errors] did not become apparent until the court’s pronouncement of the sentence.” *Id.* at 401, ¶ 6.

But this Court has made clear that sentencing errors are subject to fundamental error review, even if the existence of error might not be evident until pronouncement of the sentence. *See, e.g., State v. Allen*, 248 Ariz. 352, 367, ¶ 58 (2020) (reviewing defendant’s claim that trial court imposed greater than presumptive sentences for fundamental error when he did not raise his arguments in the trial court); *State v. Bush*, 244 Ariz. 575, 595–96, ¶¶ 88–93 (2018) (reviewing claim that defendant’s sentences violated double punishment statute for fundamental error only); *State v. Carlson*, 237 Ariz. 381, 400, ¶ 78 (2015) (“Because [the defendant] did not object at trial to the imposition of consecutive sentences, we review his claim that such sentences are illegal for fundamental error.”); *State v. Forde*, 233 Ariz. 543, 574, ¶ 137 (2014) (reviewing imposition of consecutive sentences initially raised on appeal for fundamental error).

Ignoring this case law, the court of appeals in *Vermuele* and in this case have concluded that a defendant should not be expected to object during the “solemn event” of sentencing. Opinion at ¶ 25 (citing *Vermuele*, 226 Ariz. at 402, ¶ 8). It is true, sentencing is a serious matter—but so is a criminal trial. Nevertheless, timely objections are required in order to ensure a trial court has the opportunity to correct an alleged error. *See State v. Gendron*, 168 Ariz. 153, 155 (1991) (“The reason for

[the] well-recognized rule [that new issues cannot be raised on appeal] is simplicity itself—without the rule, the system won’t work.”); *see also State v. Davis*, 226 Ariz. 97, 100, ¶ 12 (App. 2010) (noting that the purpose behind fundamental error review “is to encourage defendants to present their objections in a timely fashion . . . when the alleged error may still be corrected”). Moreover, a defendant need not interrupt a judge imposing a sentence to sufficiently preserve a claim of error. Making an objection immediately after the judge finishes would surely be sufficient. Indeed, in this case, as often happens, the trial judge expressly provided an opportunity to do so. *See* R.T. 5/18/22, at 12 (“Anything else from the defense?”). And a defendant may always seek a modification of sentence under Rule 24.3 if the sentence is “imposed in an unlawful manner.” Ariz. R. Crim. P. 24.3(a).

In sum, because the sentencing error here was not raised in the trial court, the error should have been reviewed for fundamental error under *Henderson* and its progeny. Because the court below declined to follow this Court’s precedents in this regard, it is imperative that this Court accept review and resolve this conflict.

V. The court of appeals’ decision should be reversed because Perez-Gutierrez cannot show fundamental, prejudicial error.

Applying fundamental error review here, Perez-Gutierrez has failed to meet his burden. *See Henderson*, 210 Ariz. at 567, ¶ 20 (stating under fundamental error review, the defendant, “not the State, bears the burden of establishing both that

fundamental error occurred and that the error caused him prejudice”); *see also* Opinion at ¶ 53 (Catlett, J., dissenting) (“Perez-Gutierrez makes no attempt to establish fundamental error, and he couldn’t do so if he tried.”). First, any error was not fundamental in nature, i.e., the alleged error did not go “to the foundation” of the sentencing hearing, take away a right essential to a fair sentencing, and was not “error of such magnitude that the defendant could not possibly have received a fair [sentence].” *Henderson*, 210 Ariz. at 567, ¶ 19; *see Trantor v. Fredrikson*, 179 Ariz. 299, 300–01 (1994) (“Although findings of fact and conclusions of law are certainly helpful on appellate review, they do not go to the foundation of the case or deprive a party of a fair hearing.”).

Further, Perez-Gutierrez has also not met his burden of establishing prejudice. Based upon the sentencing record, which shows discrete sexual acts on separate days and the trial court’s consideration of all arguments and the presentence report, it would be pure speculation to suggest that the trial court would not have imposed consecutive sentences had it not more fully stated its reasons. *See State v. Dickinson*, 233 Ariz. 527, 531, ¶ 13 (App. 2013) (requiring more than speculation to prove prejudice); *see also State v. Williams*, 128 Ariz. 548, 563 (App. 1995) (approving consecutive sentences even where, unlike the instant case, multiple sexual offenses were committed in “very rapid succession,” and noting that “it is against public policy to allow a person to repeat the crime of

rape as many times as he likes on the same victim with no additional criminal liability for the subsequent rapes”).

VI. Conclusion.

For these reasons, this Court should grant review and vacate the decision below. Alternatively, this Court should depublish the opinion below.

RESPECTFULLY SUBMITTED this 6th day of July, 2023.

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