

NOTICE: NOT FOR PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION DOES NOT CREATE
LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

FRANCIS RAY COLLINS II, *Appellant*.

No. 1 CA-CR 12-0296
FILED 06-05-2014

Appeal from the Superior Court in Maricopa County
No. CR 2009-146445-001
The Honorable Randall H. Warner, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Andrew Reilly
Counsel for Appellee

Michael J. Dew, Attorney at Law, Phoenix
By Michael J. Dew
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Lawrence F. Winthrop delivered the decision of the Court, in which Judge Maurice Portley and Judge Andrew W. Gould joined.

WINTHROP, Presiding Judge:

¶1 Francis Ray Collins II was arrested, indicted, tried and convicted for the second-degree murder of his wife. On appeal, Collins contends the trial court erred by: (1) permitting the State to impeach him with his prior convictions; (2) requiring that he wear a stun belt during trial; and (3) considering an improper aggravating factor in imposing sentence. For reasons that follow, we affirm.

DISCUSSION

I. *Impeachment with Prior Convictions*

¶2 Before trial, pursuant to Arizona Rule Evidence 609, the State moved to impeach Collins with his prior felony convictions if he testified. The motion listed two 1993 Arizona felony convictions and two federal felony convictions from 1986 and 1990. After argument, the court found that the convictions were outside of the ten-year limit, but ruled that the State could use two of the convictions to impeach Collins. The court observed that under Rule 609 the question for considering admission of convictions outside the ten-year limit is “whether the probative value of the prior convictions substantially outweighs the prejudicial effect” and concluded only two of Collins’s convictions would be admissible because the two were probative on credibility. The court, however, mitigated any prejudicial effect by sanitizing the convictions, including precluding the State from indicating the convictions were for federal crimes. The trial court gave the State the option of choosing which two convictions to use and the State elected to use the two federal felonies. Collins testified and admitted during cross-examination that he had two felony convictions.

¶3 Collins argues that the trial court erred in allowing use of the prior convictions because they were over ten years old. When reviewing a ruling on the admissibility of prior convictions, we will overturn the

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ruling “only if it proves to have been a clear abuse of discretion.” *State v. Green*, 200 Ariz. 496, 498, ¶ 7, 29 P.3d 271, 273 (2001). “[I]f more than 10 years have passed since the witness’s conviction or release from confinement for it, whichever is later,” then evidence of a conviction is admissible “only if . . . its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect” Ariz. R. Evid. 609(b).

¶4 In *Green*, our supreme court stated that there were no “set guidelines” for determining the admissibility of a remote prior conviction. 200 Ariz. at 499, ¶ 12, 29 P.3d at 274. Instead, the court held a trial court should consider many factors, such as the remoteness of the prior; the nature of the prior; the length of the former imprisonment; the age of the defendant; the defendant’s conduct since the prior offense; the impeachment value of the prior; the similarity between the prior conviction and the present crimes; the importance of the defendant’s testimony; and the centrality of the credibility issues. *Id.*

¶5 Collins contends the trial court abused its discretion by allowing use of his convictions over ten years old because the court “did not consider *any* of the factors set forth in [*Green*].” We disagree. The court expressly noted the probative value of the prior convictions and also expressly referenced the nature and age of the prior offenses. Thus, the court directly addressed on the record three of the factors listed in *Green*. Moreover, although there was no specific mention of the other factors enumerated in *Green*, the record supports that they were also considered by the court in that Collins thoroughly argued each of them to the trial court in opposing the State’s motion. *Cf. State v. Whitney*, 159 Ariz. 476, 485, 768 P.2d 647 (1989) (holding trial court did not abuse its discretion when it failed to make specific Rule 609 findings because the record showed “the court listened to arguments of counsel and then made its decision”).

¶6 Here, the record reflects that the trial court found that the probative value of two of the convictions in sanitized fashion would substantially outweigh their prejudicial effect as required under Rule 609 for the admission of prior convictions over ten years old. The record further indicates the court considered the appropriate factors in conducting its balancing and limited the potential prejudice by allowing use of only two of the convictions and sanitizing them. “Generally, a court abuses its discretion where the record fails to provide substantial support for its decision or the court commits an error of law in reaching the decision.” *Files v. Bernal*, 200 Ariz. 64, 65, ¶ 2, 22 P.3d 57, 58 (App.

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2001) (citation omitted). Neither is true in this case. The court did not abuse its discretion in permitting the use of two prior convictions for impeachment purposes.¹

II. *Use of Stun Belt*

¶7 During trial, the Maricopa County Sheriff's Office court security department had Collins wear a leg brace and a remotely activated custody control stun belt for security purposes. On the thirty-first day of trial, during a recess in the proceedings, the stun belt apparently spontaneously activated outside the presence of the jury and the trial judge. As described by defense counsel, this caused Collins to scream profanities, fall to the ground, and lose bladder control as he tried to get the belt off.

¶8 In response to this incident, Collins requested that the stun belt be removed for the remainder of trial. As a substitute, Collins suggested an increase in the number of security officers in the courtroom. The State took no position on the request, but the motion was opposed by the Sheriff's Office. The trial court correctly held an evidentiary hearing at which a court security supervisor testified to the reasons for requiring the stun belt. Based on the supervisor's testimony and the trial court's own observations of Collins, the trial court denied the motion, ruling that the stun belt was necessary to ensure safety in the courtroom.

¶9 "Generally, matters of courtroom security are left to the discretion of the trial court." *State v. Dixon*, 226 Ariz. 545, 551, ¶ 22, 250 P.3d 1174, 1180 (2011) (citation and quotation marks omitted). This includes the use of restraints on a defendant when "necessary to prevent escape or to maintain order in the courtroom." *State v. Watson*, 114 Ariz. 1, 11, 559 P.2d 121, 131 (1976). A trial judge, however, "must have grounds for ordering restraints and should not simply defer to the prosecutor's request, a sheriff's department's policy, or security personnel's preference for the use of restraints." *State v. Cruz*, 218 Ariz. 149, 168, ¶ 119, 181 P.3d 196, 215 (2008). "We will uphold a trial court's decision concerning trial

¹ The State notes that "Arizona courts have not expressly addressed what date should be used as the end date for the ten-year limit" in Rule 609, and invites us to rule on that in our decision, arguing it should be the date of the offense. However, because the trial court's ruling and our decision do not turn on that issue, we decline to do so.

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security measures when the decision is supported by the record.” *State v. Davolt*, 207 Ariz. 191, 211, ¶ 84, 84 P.3d 456, 476 (2004) (citation omitted).

¶10 The trial court did not abuse its discretion by denying Collins’s motion that he not be required to wear a stun belt. The court, consistent with *Deck v. Missouri*, 544 U.S. 622, 633 (2005), and *State v. Gomez*, 211 Ariz. 494, 503, ¶ 43, 123 P.3d 1131, 1140 (2005), made a case-specific determination that particular security concerns warranted the continued use of a stun belt. The facts found by the court supporting the ruling consisted of the seriousness and violent nature of the charged offense; Collins’s criminal history, including a prior escape attempt; his security classification in jail; his self-admitted temper; his size and strength; and his lack of self-control during trial.

¶11 The trial court could reasonably find that no other measure could provide the same level of security as the stun belt. Although use of additional security personnel in the courtroom could mitigate the risk of escape, in the absence of shackles, use of a stun belt would be the only reasonable way to prevent an attack against persons in the courtroom given the closeness of defendant to the jury, prosecutor, witnesses, and court personnel. In reaching its decision, the trial court was cognizant of the potential that continued use of a stun belt, given its previous apparent spontaneous activation, would “carry a risk of distracting [Collins] and inhibiting his ability to participate in the trial.” Nevertheless, the court concluded that use of a stun belt was “necessary for the security of those participating in this trial.” On this record, there was no abuse of discretion. See *State v. Lee*, 189 Ariz. 608, 617, 944 P.2d 1222, 1231 (1997).

III. *Imposition of Aggravated Sentence*

¶12 The jury convicted Collins of second-degree murder and determined it to be a dangerous and a domestic violence offense. During the aggravation phase, the jury additionally found the State had proven three alleged aggravating factors – infliction of serious physical injury; use of a dangerous instrument; and commission of the offense in an especially cruel manner. The trial court thereafter sentenced Collins to an aggravated nineteen-year prison term with credit for 1067 days of presentence incarceration.

¶13 Collins contends the trial court erred in considering “serious physical injury” as an aggravating factor, claiming its use in imposing

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sentence would constitute illegal double counting in violation of Arizona Revised Statutes (“A.R.S.”) section 13-701(D)(1) (West 2014).² The statute provides for consideration of infliction of serious physical injury as an aggravating factor, “except if this circumstance is an essential element of the offense of conviction or has been utilized to enhance the range of punishment” A.R.S. § 13-701(D)(1). “Serious physical injury” is an essential element of homicide. *State v. Harvey*, 193 Ariz. 472, 476, ¶ 16, 974 P.2d 451, 455 (App. 1998); *see also* A.R.S. § 13-105(38) (West 2014) (defining “serious physical injury” as including “physical injury that creates a reasonable risk of death”).

¶14 The trial court has broad discretion in sentencing, and absent a finding of abuse of discretion, we will uphold a sentence that is within statutory limits. *State v. Sproule*, 188 Ariz. 439, 440, 937 P.2d 361, 362 (App. 1996). We review *de novo* an alleged legal error in sentencing. *State v. Virgo*, 190 Ariz. 349, 352, 947 P.2d 923, 926 (App. 1997). Whether a court properly employed a given factor to aggravate a sentence presents a question of law for our independent determination. *State v. Alvarez*, 205 Ariz. 110, 113, ¶ 6, 67 P.3d 706, 709 (App. 2003). Because Collins failed to object below, our review is limited to fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To obtain relief under this standard of review, Collins has the burden of showing both fundamental error and resulting prejudice. *Id.* at ¶ 20.

¶15 Contrary to Collins’s contention, there was no error in the imposition of the aggravated sentence because the trial court did not use the jury’s finding of serious physical injury to aggravate the sentence. Our review of the record finds the trial court relied on the jury’s finding that the killing was a cruel murder and Collins’s criminal history in ruling that imposition of an aggravated sentence was appropriate. No mention was made by the trial court of serious physical injury as an aggravating factor in imposing sentence.

² We cite the current Westlaw version of the applicable statutes because no revisions material to this decision have since occurred.

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CONCLUSION

¶16 For the foregoing reasons, we affirm the conviction and sentence.



Ruth A. Willingham · Clerk of the Court
FILED : gsh