NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2009-0186
	)	DEPARTMENT A
Appellee,	)	
	)	MEMORANDUM DECISION
v.	)	Not for Publication
	)	Rule 111, Rules of
DAVID YULO MARTINEZ III,	)	the Supreme Court
	)	
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20083774

Honorable Jane L. Eikleberry, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Jonathan Bass — Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes — Tucson
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant David Martinez was convicted of four counts each of aggravated assault with a deadly weapon and armed robbery. The trial court sentenced him to a combination of consecutive and concurrent, aggravated sentences

totaling ninety years' imprisonment. Martinez raises numerous arguments on appeal. Finding no reversible error, we affirm his convictions and sentences.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Between June and September 2008, Martinez, armed with a handgun, entered several pharmacies and demanded narcotics. An individual eventually informed police that Martinez had committed the robberies and several witnesses then identified Martinez's photograph from a photographic lineup. Martinez was arrested and charged with numerous counts of aggravated assault and armed robbery. A jury found him guilty of eight of the charges, and this appeal followed.

Motion for Mistrial

¶3 Martinez first argues the trial court erred in denying his motion for mistrial, which was based upon "improper communication between [a witness for the state] and a potential juror" who was later excused for cause. "[W]e will not overturn a trial court's decision to grant or deny a new trial because of [a witness's] alleged improper contact with the jury absent a clear abuse of discretion." *State v. Jones*, 185 Ariz. 471, 484, 917 P.2d 200, 213 (1996). As a general rule, "[j]urors and witnesses should avoid any type of conversation or contact during trial." *State v. Apodaca*, 166 Ariz. 274, 276, 801 P.2d 1177, 1179 (App. 1990). Nevertheless, juror communications with a witness are not grounds for mistrial unless the communication was "prejudicial or prejudice may be fairly presumed" from the facts of the case. *Id.* And the trial court is in

the best position to determine the credibility of witnesses as to the contents of their conversation and to assess the effect of a conversation on prospective jurors under the circumstances. *See id.* at 276-77, 801 P.2d at 1179-80.

¶4 While on a break during jury selection, a prospective juror approached a detective who was a witness in the case. When the detective asked the prospective juror why he was there, the juror replied that he knew everyone involved in the case and was waiting to be dismissed from the jury pool. Although the prospective juror was immediately dismissed for cause when selection resumed, Martinez nevertheless moved for a mistrial based on the conversation.

¶5 During the hearing on Martinez's motion, the detective testified that other prospective jurors had been in the hallway when the conversation occurred but were not "within hearing range." The trial court found that, although there was a "little bit of a difference between" the prospective juror's version of the conversation and the detective's, either version was "innocuous" and, in any event, there was no reason to conclude that any other prospective jurors had heard any portion of the conversation. The court therefore concluded the conversation could not have prejudiced Martinez and denied his motion for mistrial.

¶6 On appeal, Martinez argues the trial court erred in denying his motion for mistrial. He claims prejudice should be presumed because the detective's testimony conflicted with the prospective juror's statements and because other members of the jury may have heard the conversation. But the court determined that no other prospective jurors had heard the conversation, thereby rendering it nonprejudicial and harmless.

Martinez did not subsequently ask the court to examine the other jurors to insure that none of them was aware of the conversation. And even if other members of the jury had indeed heard the conversation, the court determined that both the detective's and the witness's versions of their exchange demonstrated that its effect would have been "innocuous." Because the trial court was in the best position to evaluate the effect of the conversation, we conclude it did not abuse its discretion in denying Martinez's motion for mistrial.

In-court Identification

¶7 Martinez next claims the trial court erred in denying his motion for a judgment of acquittal on all counts. He argues the evidence presented at trial was insufficient to support the jury's verdicts because the witnesses who identified him at trial "did so based on a photographic lineup that was . . . overly suggestive," tainting their in-court identifications. The state argues, however, that this claim is waived on appeal because Martinez did not challenge the validity of the photographic lineup either by requesting a hearing pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), or by "ask[ing] the trial court to suppress the in-court identifications" as tainted.

¶8 If an in-court identification is "'not challenged at the trial level, it will be presumed thereafter that prior identification procedures did not taint the . . . identification.'" *State v. Carriger*, 112 Ariz. 302, 304, 541 P.2d 554, 556 (1975), *quoting Dessureault*, 104 Ariz. at 384, 454 P.2d at 955. Here, although Martinez moved for a judgment of acquittal claiming there was "insufficient evidence of a reliable in-court identification," he did not object at the time of the in-court identifications. He therefore

has forfeited review of this claim absent fundamental error. *See State v. Lopez*, 217 Ariz. 433, ¶ 6, 175 P.3d 682, 684 (App. 2008). Because Martinez does not argue on appeal that the error was fundamental, and because we have independently found 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) (fundamental-error argument waived on appeal if not argued); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it sees it).

¶9 Martinez, however, couches his argument as a challenge to the sufficiency of the evidence. But the jury heard the evidence concerning the identifications and Martinez's challenges to their reliability. Determining that issue of credibility was the province of the jury. *State v. Lee*, 217 Ariz. 514, ¶ 10, 176 P.3d 712, 714 (App. 2008).

Jury Instructions

¶10 Martinez also claims the trial court did not instruct the jury adequately on the elements of aggravated assault. Because he did not object to the jury instructions below, we review this claim for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Under this standard of review, the defendant bears the burden of showing that the error was fundamental and that it caused him prejudice. *Id.* ¶ 20. We will not find reversible error with respect to jury instructions unless "a jury would be misled by the instructions when taken as a whole." *State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007).

¶11 Martinez maintains the trial court's aggravated assault instruction was erroneous because it "did not include the definition of [simple] assault" and therefore did

not inform the jury of the "culpable mental state and [of] the requirement that the victim be placed in reasonable apprehension of imminent physical injury." But Martinez is mistaken in claiming the elements of simple assault were missing from the instructions. In its final instructions, the court informed the jury that "[t]he crime of aggravated assault with a deadly weapon requires proof of the following two things: 1. [t]he defendant committed an assault which requires proof that the defendant intentionally placed another person in reasonable apprehension of immediate physical injury; and 2. [t]he defendant used a deadly weapon." Taken as a whole, the instructions "correctly reflect[ed] the law" with respect to the elements necessary to convict Martinez of aggravated assault, including the mental state required. *Id.*; *see also* A.R.S. §§ 13-1204(A) (elements of aggravated assault); 13-1203(A)(2) (simple assault requires "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury"). We find no reversible error, much less fundamental error, in the court's instructions.

Sentencing

¶12 Martinez finally contends the trial court erred in ordering that he serve several of his sentences consecutively. Relying on *State v. Garza*, 192 Ariz. 171, 962 P.2d 898 (1998), and *State v. Fillmore*, 187 Ariz. 174, 927 P.2d 1303 (App. 1996), Martinez concedes that his sentences were valid per se but nonetheless argues that the court displayed an impermissibly "mechanistic application of the sentencing statutes" in which it failed to exercise its discretion to consider mitigating factors, thereby abusing it. But Martinez failed to raise this issue below and has therefore forfeited all but fundamental error review. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. As we

have explained above, the defendant, not the state, has the "burden of persuasion in fundamental error review." *Id.* And Martinez does not argue, nor have we independently found, that any fundamental error occurred during sentencing. *See Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650 (court will not ignore fundamental error if it sees it). Therefore, he has not sustained his burden in a fundamental error analysis, and we need not address this argument further. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140 (forfeited argument waived on appeal if fundamental error nor argued).

Conclusion

¶13 In light of the foregoing, we affirm Martinez's convictions and the sentences imposed.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge