

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SHAWN LAMAR JOHNSON,
Appellant.

No. 2 CA-CR 2014-0331
Filed May 7, 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NOT FOR PUBLICATION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 Pima County
No. CR20124288001
The Honorable Casey F. McGinley, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Roach Law Firm, L.L.C.
By Brad Roach, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

M I L L E R, Presiding Judge:

¶1 Shawn Johnson was convicted after a jury trial of aggravated assault causing serious physical injury and sentenced to a presumptive term of 11.25 years. He was acquitted of two counts of kidnapping. On appeal, he argues the trial court erred by failing to sever the aggravated assault count from the two kidnapping counts. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In October 2012, Johnson struck victim P.V. repeatedly in the face until his facial bones were broken and he was unconscious. Johnson left the scene and later fled to a nearby apartment occupied by T.W. and A.A. Johnson told them about the fight and threatened that if they told anyone he would kill them. He stayed in their apartment for about twelve to thirteen hours, and they did not believe they could leave. Johnson was later indicted for aggravated assault against P.V. and kidnapping charges related to T.W. and A.A. He was convicted and sentenced as described above and this appeal followed.

Discussion

¶3 Johnson contends the trial court abused its discretion by denying his motion to sever counts. The state correctly notes that Johnson failed to renew his motion to sever during trial, as required by Rule 13.4(c), Ariz. R. Crim. P. A defendant who fails to renew a motion to sever during trial forfeits review of the issue for all but fundamental error. *State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769,

STATE v. JOHNSON
Decision of the Court

772 (1996). To prevail under the fundamental error standard of review, a defendant must show that fundamental error exists and that he suffered prejudice. *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005). Further, failure to argue fundamental error on appeal waives the argument on appeal. See *State v. Flythe*, 219 Ariz. 117, ¶ 11, 193 P.3d 811, 814 (App. 2008); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).¹

¶4 Johnson does not argue the trial court committed fundamental error, nor that any error caused him prejudice. Indeed, the jury was instructed to consider each offense separately, and the jury acquitted him on the kidnapping counts. He cannot meet his burden of showing the failure to sever the kidnapping counts caused him prejudice. See *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

Disposition

¶5 For the foregoing reasons, we affirm Johnson's conviction and sentence.

¹Johnson argues *Moreno-Medrano*, on which the state relies for its waiver argument, only applies to cases in which a defendant failed to preserve an argument because it was never presented to the trial court, unlike severance issues. But in *Flythe*, we determined that failure to argue fundamental error will also waive a severance argument on appeal where a defendant moved to sever but failed to renew the motion. 219 Ariz. 117, ¶¶ 4, 11, 193 P.3d at 813-14.