

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CLAUDIUS C. MURRAY,
Appellant.

No. 2 CA-CR 2018-0312
Filed December 5, 2019

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20170096002
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
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Counsel for Appellee

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Claudius Murray appeals from his conviction and sentence for aggravated assault with a deadly weapon or dangerous instrument. We address in this decision: (1) whether the state’s presentation of evidence together with the trial court’s instructions resulted in a constructive amendment to Murray’s indictment and created a risk of a nonunanimous jury verdict and (2) whether the court erred in allowing testimony of a witness allegedly lacking personal knowledge as required by Rule 602, Ariz. R. Evid.¹ For the following reasons, and for reasons addressed in the accompanying published opinion, we affirm Murray’s conviction and sentence.

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 Murray.² See *State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). In December 2016, Murray and his brother Easton went to O.C.’s apartment. Murray was carrying a firearm and Easton was carrying a black bag. The brothers asked O.C. to store some marijuana for them, but O.C. refused and asked them to leave. An argument ensued, and then Easton and O.C. began fighting. During the fight, Easton shocked O.C. with a taser. After Murray unsuccessfully attempted to pull O.C. off of him, Easton told Murray to shoot O.C. Murray shot O.C. in the leg.

¹Murray also claims the state committed prosecutorial misconduct warranting reversal. Because disposition of Murray’s prosecutorial misconduct claims merits publication, the claims are addressed in a simultaneously issued opinion. See Ariz. R. Sup. Ct. 111(h); Ariz. R. Crim. P. 31.19(f).

²A more detailed recitation of the facts is contained in the published opinion.

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¶3 Officers found a shell casing matching Murray’s gun outside O.C.’s apartment. Police also found an eight-pound bale of marijuana, scales, cell phones, and packing and shipping materials inside O.C.’s apartment. O.C. claimed that the marijuana was not his and that the brothers had previously left the scales and shipping materials at his apartment.

¶4 Following a jury trial, Murray was convicted of aggravated assault with a deadly weapon or dangerous instrument committed by intentionally, knowingly, or recklessly causing physical injury in violation of A.R.S. § 13-1204(A)(2).³ The trial court denied Murray’s motion for new trial and sentenced him to a mitigated five-year term of imprisonment.

¶5 This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶6 On appeal, Murray argues: (1) the trial court constructively amended the indictment, depriving him of his Sixth Amendment right to notice of the charges against him and creating a risk of a non-unanimous jury verdict and (2) the court erred in allowing O.C.’s testimony as to the contents of the black bag despite his lack of personal knowledge.

Indictment

¶7 Murray argues that because the trial court allowed the state to present “new evidence that Easton had tased [O.C.]” and “updated its own jury instructions in order to accommodate” this new allegation, there was a substantial likelihood he was convicted of using a taser as a dangerous instrument to commit aggravated assault as Easton’s accomplice, an offense not charged in the indictment. And, by removing the firearm allegation from its final jury instructions, Murray claims, the court “impermissibly broadened the facts upon which the charge was based.” Because Murray failed to object at trial and concedes that

³Murray and Easton were tried jointly, and Easton was also convicted of aggravated assault with a deadly weapon or dangerous instrument. On appeal, we affirmed his conviction. *See State v. Murray*, No. 2 CA-CR 2018-0313, 2019 WL 4894121 (Ariz. Ct. App. Oct. 4, 2019).

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fundamental-error review is appropriate on appeal,⁴ we review Murray's claim only for fundamental error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018).⁵

¶8 An indictment "limits the trial to the specific charge or charges stated in . . . the grand jury indictment" and "may be amended only to correct mistakes of fact or remedy formal or technical defects" absent a defendant's consent. Ariz. R. Crim. P. 13.5(b). An indictment is constructively amended when a trial court allows the state to "prove its case in a fashion that creates a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *State v. Sanders*, 205 Ariz. 208, ¶ 81 (App. 2003) (Hall, J., dissenting) (quoting *United States v. Apodaca*, 843 F.2d 421, 428 (10th Cir. 1988)), *overruled on other grounds by State v. Freaney*, 223 Ariz. 110 (2009). Moreover, the Sixth Amendment requires defendants to have "actual notice of the charge, from either the indictment or other sources." *Freaney*, 223 Ariz. 110, ¶ 29; *see also* U.S. Const. amend. VI. A violation occurs when a defendant receives insufficient notice and is therefore actually prejudiced by the new or amended charge. *Freaney*, 223 Ariz. 110, ¶ 29.

¶9 Here, the trial court's preliminary instructions informed the jury that Murray and Easton were both charged with "assault[ing] [O.C.] with a deadly weapon or dangerous instrument, to wit, a firearm" based on

⁴In his opening brief, Murray claims his motion for judgment of acquittal and his motion for new trial preserved this issue for appeal. However, neither motion raised an objection to the taser evidence for the reasons Murray now raises on appeal. Moreover, any issue first raised in Murray's motion for new trial would not have been preserved. *See State v. Larin*, 233 Ariz. 202, ¶ 14 (App. 2013) (issue raised for first time in motion for new trial forfeited unless fundamental and prejudicial error).

⁵A defendant who fails to object at trial forfeits the right to appellate relief unless he can show that trial error exists, and that the error went to the foundation of the case, took from him a right essential to his defense, or was so egregious that he could not possibly have received a fair trial. *See Escalante*, 245 Ariz. 135, ¶ 21. If a defendant can show an error went to the foundation of the case or deprived him of a right essential to his defense, he must separately show prejudice resulted from the error. *Id.* If a defendant shows the error was so egregious he could not have received a fair trial, however, he has necessarily shown prejudice and must receive a new trial. *Id.*

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the state's original theory that both brothers had been armed with firearms at the time of the assault. On the second day of trial, however, the state learned O.C. planned to testify that Easton had tased him. With respect to Murray's involvement, the evidence presented at trial centered around his use of a firearm to commit aggravated assault. Multiple witnesses testified about or in connection with the shooting, including O.C., his neighbor, a firearms examiner, and several law enforcement officers.

¶10 During its closing argument, the state emphasized assault "becomes aggravated . . . if you find that a firearm was used to help commit th[e] simple assault" and the assault charge was aggravated because "[a] deadly weapon was used in this case. A deadly weapon is a firearm." The state repeated, "We have the deadly weapon in this case and we have a man who was injured by a deadly weapon. That's [O.C.] shot in the leg by that deadly weapon." Further, the state argued Easton was guilty as an accomplice because he helped Murray shoot O.C. by wrestling with him and tasing him. The state did not argue Murray had tased O.C. or was an accomplice to the tasing. And, pertinent to Murray's argument that the final jury instructions omitted the firearm allegation, the instructions specifically defined "deadly weapon" as "anything designed for lethal use, including a firearm." Further, although the state presented evidence of Easton's use of the taser, the jury was never instructed that a taser could be considered a deadly weapon or dangerous instrument.

¶11 The state's presentation of evidence and closing argument, together with the trial court's final jury instructions, made clear that the charged assault involved the firearm as a deadly weapon and the gunshot wound as the resulting injury. And, the jury found Murray guilty of aggravated assault "as alleged in Count One of the indictment" – that is, with a firearm. *See State v. Prince*, 204 Ariz. 156, ¶ 9 (2003) (presumption that jurors follow instructions). Neither the state's presentation of its case nor the court's jury instructions created a substantial likelihood Murray was convicted of the tasing incident as Easton's accomplice. Thus, we find no error, fundamental or otherwise.

¶12 Murray also argues, based on the evidence presented and the jury instructions given, the aggravated assault charge was duplicitous and created a risk that the jury would not reach a unanimous verdict as to how he committed the assault. Specifically, he claims some jurors may have found him guilty of aggravated assault with a firearm, while others may have found him guilty of aggravated assault with a taser as Easton's accomplice. Because Murray did not timely object, we review only for fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 12; *see also*

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State v. Anderson, 210 Ariz. 327, n.3 (2005) (when basis for duplicity objection not learned until trial, prompt objection at trial timely); *State v. Klokic*, 219 Ariz. 241, ¶ 13 (App. 2008) (defendant preserved duplicity objection not raised prior to trial because “asserted error [went] not to the indictment on its face, but to the evidence presented to prove a count of the indictment”); *but see State v. Butler*, 230 Ariz. 465, ¶ 15 (App. 2012) (expressing doubt as to whether duplicity may be raised on appeal in absence of objection below).

¶13 “A duplicitous charge exists ‘[w]hen the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge,’” creating a risk of a nonunanimous jury verdict. *State v. Waller*, 235 Ariz. 479, ¶ 33 (App. 2014) (quoting *Klokic*, 219 Ariz. 241, ¶ 12). As noted, the state did not introduce evidence of multiple criminal acts to prove aggravated assault as alleged in the indictment. Murray’s indictment indicated the charged assault was committed using a firearm, and the jury found him guilty of aggravated assault “as alleged in . . . the indictment.” At no time did the state present evidence or argument encouraging the jury to find Murray guilty as an accomplice to Easton tasing O.C. Moreover, as discussed above, the final jury instructions indicated that firearms are included within the definition of “deadly weapon.” Neither the trial court’s instructions nor the state’s argument indicated to the jury that a taser could be considered a dangerous instrument.⁶ Because there is no reason to believe the jury’s verdict was based on anything other than Murray’s use of a firearm to assault O.C., we find no error, fundamental or otherwise.⁷

O.C.’s Testimony Regarding the Contents of the Black Bag

¶14 Murray argues the trial court erred in allowing O.C. to testify about the black bag Murray and Easton brought to the apartment because O.C. had no personal knowledge as to its contents. We review evidentiary

⁶As Murray notes, a taser *may* constitute a dangerous instrument under certain circumstances. *State v. Gustafson*, 233 Ariz. 236 (App. 2013).

⁷Murray also argues the state’s closing argument contributed to the risk of a non-unanimous verdict when it explained that the jury did not “have to decide things that aren’t elements beyond a reasonable doubt,” and that they could “have disagreements amongst [them]selves as to what might have happened in a particular circumstance that doesn’t amount to an element of the case.” In light of our disposition of this issue, we need not address Murray’s argument.

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rulings for an abuse of discretion where a defendant timely objects. *See State v. Pandeli*, 215 Ariz. 514, ¶ 41 (2007). However, defendants in a joint trial cannot rely on the objections of a codefendant's counsel to preserve error on appeal unless they are deemed to have joined in each other's objections. *See State v. Murray*, 184 Ariz. 9, 28 (1995) (citing *State v. Thomas*, 130 Ariz. 432, 435 (1981)); *State v. Grannis*, 183 Ariz. 52, 56-57 (1995) ("On appeal, a defendant cannot take advantage of objections made by a co-defendant in the absence of stipulation or understanding to that effect.") (quoting *People v. Brown*, 167 Cal. Rptr. 557, 562 (Ct. App. 1980)), *disapproved of on other grounds by State v. King*, 225 Ariz. 87 (2010); *cf. State v. Marahrens*, 114 Ariz. 304, 306 (1977) (improper for defense counsel to rely on codefendant's pretrial motion), *superseded by rule on other grounds as stated in State v. Schurz*, 176 Ariz. 46 (1993).

¶15 Murray did not join in Easton's objection to testimony concerning the bag. Thus, he has forfeited this issue on appeal absent a finding of fundamental error. *See Thomas*, 130 Ariz. at 435. And, because Murray does not argue admission of the testimony amounted to fundamental error, his argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (argument waived where defendant does not argue unpreserved error was fundamental).⁸

Disposition

¶16 For the foregoing reasons, and for the reasons addressed in the accompanying published opinion, we affirm Murray's conviction and sentence.

⁸Even assuming Murray has not waived this issue, we agree with the conclusion reached in Easton's case as to this issue. *See Murray*, 2019 WL 4894121, ¶ 12 (even if testimony speculative it was cumulative and amounted to harmless error).