

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



DIVISION ONE  
FILED: 12/27/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 11-0391  
)  
Appellee, ) DEPARTMENT C (AUGUST)  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
CHRISTIAN GARCIA CALBILLO, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-171400-002SE

The Honorable Connie Contes, Judge

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Division  
And Joseph T. Maziarz, Assistant Attorney General  
Attorneys for Appellee

Bruce F. Peterson, Maricopa County Legal Advocate Phoenix  
By Consuelo M. Ohanesian, Deputy Legal Advocate  
Attorneys for Appellant

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G E M M I L L, Judge

¶1 Defendant Christian Garcia Calbillo appeals his convictions and sentences for second-degree murder and attempted second-degree murder on the ground the judge fundamentally erred

by improperly instructing the jury on the elements of the latter offense.

¶12 This case involves a late night roadway shooting. The evidence at trial showed that at about 2:30 a.m. on a Sunday morning in downtown Mesa, Calbillo shot multiple rounds at a truck driven by Alvaro M. Calbillo fired the shots from a Blazer driven by his friend who had pulled up next to Alvaro M.'s truck at a stop light. At the time of the shooting, there were four passengers in the truck. Christian G. was in the front passenger seat, and Cynthia C., Efren M., and Mariela G. were sitting in the backseat. Christian G., the front-seat passenger, died of multiple gunshot wounds, and Alvaro M. was paralyzed.

¶13 Calbillo claimed that he shot Christian G. in self-defense, believing that Christian G. was reaching for a gun to kill him, as Christian G. had threatened to do just moments before. Police, however, did not find any guns in Alvaro M.'s truck, nor any bullet strikes on the Blazer in which Calbillo was a passenger.

¶14 A grand jury indicted Calbillo on one count of first-degree murder of Christian G., and one count each of attempted first-degree murder, or alternatively, aggravated assault, of Alvaro M., Cynthia C., Efren M., and Mariela G. In the first trial, the jury acquitted Calbillo of attempted first-

degree murder of Alvaro M. and of aggravated assault of Cynthia C., Efren M., and Mariela G.<sup>1</sup> The jury, however, was unable to reach a verdict on the lesser-included offense of attempted second-degree murder of Alvaro M., and was unable to reach any verdict on the charge of murdering Christian G.

¶15 In the second trial, the jury convicted Calbillo of the lesser-included offense of second-degree murder of Christian G., and of attempted second-degree murder of Alvaro M. The jury found the latter offense to be a dangerous offense. The judge sentenced Calbillo to concurrent terms of sixteen years in prison. Calbillo filed a timely notice of appeal.

¶16 Calbillo argues that the judge improperly instructed the jury on the elements of attempted second-degree murder, allowing the jury to convict Calbillo of the offense "even if he knew only that his conduct would cause serious physical injury and did not intend or know that his conduct would cause death." The judge instructed the jury that it could convict Calbillo of attempted second-degree murder if it found an attempt, as defined by A.R.S. § 13-1001(A) (2010)<sup>2</sup>, and if it found that he

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<sup>1</sup> The State apparently elected to pursue only the aggravated assault charges with respect to Cynthia C., Efren M., and Mariela G., and to drop the alternative charge of aggravated assault of Alvaro M.

<sup>2</sup> We cite to the current versions of the statutes when no revisions material to this decision have occurred since the date of the alleged offenses.

either intended to cause the death, or knew that his conduct would cause death "or serious physical injury." We have previously held that a judge erred in giving a similar instruction, because it misstated the law by authorizing the jury to convict the defendant "even if he knew only that his conduct would cause serious physical injury and did not intend or know that his conduct would cause death." *State v. Ontiveros*, 206 Ariz. 539, 541, ¶ 11, 542-43, ¶¶ 16-20, 81 P.3d 330, 332, 333-34 (App. 2003). The State urges us to depart from *Ontiveros*, arguing that it was wrongly decided. We disagree and decline the State's request that we revisit this issue. We hold that the instruction in this case was similarly defective and was given in error.

¶7 Because Calbillo did not object at trial to this portion of the instruction,<sup>3</sup> however, Calbillo "bears the burden of establishing both that fundamental error occurred and that the error caused him prejudice." See *State v. Henderson*, 210 Ariz. 561, 568, ¶¶ 21-22, 115 P.3d 601, 608 (2005). Error is fundamental when it goes to the foundation of the defendant's case, takes from him a right essential to his defense, and is

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<sup>3</sup> On Calbillo's objection, the judge removed the language in the instruction that would have allowed the jury to convict the defendant of attempted second-degree murder based on reckless conduct manifesting extreme indifference to life. See *State v. Curry*, 187 Ariz. 623, 627-28, 931 P.2d 1133, 1137-38 (App. 1996).

error of such magnitude that he could not possibly have received a fair trial. *Id.*, at 567, ¶ 19, 115 P.3d at 607 (citation omitted). Because the instruction allowed the jury to consider a nonexistent theory of liability, giving the instruction was fundamental error. See *Ontiveros*, 206 Ariz. at 542, ¶¶ 16-17, 81 P.3d at 333.

¶18 We conclude, however, that the error does not require reversal because Calbillo has failed to meet his burden to establish that the error was prejudicial. To prove prejudice, the defendant must show that a reasonable jury or judge could have reached a different result absent the error. *Henderson*, 210 Ariz. at 569, ¶ 27, 115 P.3d at 609. On appeal, Calbillo relies on speculation that the jury might have convicted him based on his intent to cause serious physical injury rather than death, which is an insufficient basis for finding prejudice. See *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006) (finding mere speculation without support from the record is insufficient to show prejudice).

¶19 Moreover, Calbillo's arguments at trial fail to support his claim of prejudice. It was not an issue at trial whether Calbillo had an intent to kill or only to seriously injure Christian G., and by extension, Alvaro M.<sup>4</sup> Rather,

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<sup>4</sup> Calbillo argues in his opening brief that there is no evidence presented to show Calbillo intended any specific harm to Alvaro

Calbillo defended solely on the basis that he shot Christian G. in self-defense. Calbillo testified that he was defending himself and it was either his life or Christian G.'s life. The judge correctly instructed the jury that Calbillo's intent in shooting Christian G. could be transferred to the shooting of the driver, Alvaro M.

¶10 The evidence established that when he shot Christian G., Calbillo intended to kill him and not simply to seriously injure him. Calbillo, possibly with an accomplice, fired more than thirty bullets in the direction of Christian G. and Alvaro M. Christian G. died from multiple gunshot wounds, including one to the left eye, another through the back of his head, a third through the right side of his neck, and a fourth to his right shoulder. Alvaro M. was paralyzed from being shot in the neck; three bullets went into or through his headrest. Calbillo admitted that when he shot at Christian G., he yelled, "Don't fuck with me anymore," explaining, "I didn't want to see him no

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M. To the extent Calbillo questions the use of transferred intent in his case, we find the doctrine was properly applied. The jury was instructed that "[t]ransferred intent is established if the actual result of the defendant's action differs from that which defendant intended or contemplated" in that a different person was affected. This instruction complies with Arizona's codified transferred intent statute A.R.S. § 13-203(B) (2010). In this case, to the extent the jury found that Calbillo intended to kill Christian G., that intent was properly transferred to Calbillo's actions against Alvaro M., establishing the basis for a conviction of attempted second degree murder.

more in my life, you know? Just cause me too many problems in my life." After firing the shots, Calbillo yelled, "You should have never fucked with me." On this record and in the absence of any evidence or argument from which a reasonable jury could conclude that Calbillo intended only to seriously injure Christian G. (and, similarly, Alvaro M. via transferred intent), we conclude that the error in instructing the jury could not have prejudiced Calbillo.

¶11 For the foregoing reasons, we affirm Calbillo's convictions and sentences.

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
MICHAEL J. BROWN, Judge

\_\_\_\_\_/s/\_\_\_\_\_  
LAWRENCE F. WINTHROP, Judge