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
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 07-1044
	)	
Appellee,	)	
	)	DEPARTMENT D
v.	)	
	)	**MEMORANDUM DECISION**
PAUL EDUARDO QUILCAT,	)	
	)	(Not for Publication –
Appellant.	)	Rule 111, Rules of the
	)	Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-030978-002 SE

The Honorable Teresa A. Sanders, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
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J O H N S E N, Judge

¶1 Paul Eduardo Quilcat appeals his conviction of one count of sexual assault, arguing the superior court erred in allowing the State to amend the indictment at the close of its case-in-chief. On July 16, 2009, this Court issued a memorandum decision affirming his conviction and sentence. On January 5, 2010, the Arizona Supreme Court granted Quilcat's petition for review and remanded this matter to the Court of Appeals in light of *State v. Freeney*, 223 Ariz. 110, 219 P.3d 1039 (2009). For the reasons stated below, we affirm Quilcat's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶2 The facts and procedural history are as recounted in *State v. Quilcat*, 1 CA-CR 07-1044, 2009 WL 2136873, at *1, ¶¶ 2-4 (Ariz. App. July 16, 2009).

DISCUSSION

A. *State v. Freeney*.

¶3 An indictment charged Quilcat with one count of sexual assault in violation of Arizona Revised Statutes ("A.R.S.") section 13-1406 (2010), "to wit: this refers to [Quilcat's] digital penetration of [the victim's] vulva while lying on the bed." Because it had no evidence of digital penetration, the State at the close of its case-in-chief moved to amend the charge to conform to the evidence by removing the "to wit" language so it could argue sexual assault by "masturbatory

contact."[1] The superior court granted the motion over Quilcat's objection.

¶4 In *Freeney*, the defendant beat the victim with a metal bar or pipe but was charged with one count of aggravated assault for having placed the victim "in reasonable apprehension of imminent physical injury," pursuant to A.R.S. § 13-1203(A)(2) (2010). 223 Ariz. at 111, ¶¶ 3-4, 219 P.3d at 1040. Before jury selection on the first day of trial, the court granted the State's motion to amend the indictment to change the theory of assault to "intentionally, knowingly, or recklessly causing any physical injury to another person," under A.R.S. § 13-1203(A)(1). *Id.* at ¶ 6. Our supreme court concluded that because the amendment altered the elements of the charged offense, it changed the nature of the offense in violation of Arizona Rule of Criminal Procedure 13.5(b). *Id.* at 113, ¶¶ 16-17, 219 P.3d at 1042 ("When the elements of one offense materially differ from those of another – even if the two are

[1] The statute under which Quilcat was charged states, "A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person." A.R.S. § 13-1406(A) (2010). Sexual intercourse is defined as "penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva." A.R.S. § 13-1401(3) (2010).

defined in subsections of the same statute – they are distinct and separate crimes.").[2]

¶5 The court also concluded the amendment violated Rule 13.5(b) because it "did not correct a mistake of fact or remedy a formal or technical defect in the indictment." *Id.* at ¶ 19. As the court explained, "In fact, the indictment was not defective at all. It simply charged [the defendant] with an offense the State later determined might be difficult to prove . . . ." *Id.*

¶6 Nevertheless, the court held the violation of Rule 13.5(b) was not prejudicial per se. *Id*. at 114, ¶ 26, 223 P.3d at 1043. Rather, when an indictment is amended in violation of Rule 13.5(b) over the defendant's objection, the conviction will not be reversed unless the State cannot show "the error was harmless beyond a reasonable doubt." *Id.* The court concluded the error in that case was harmless because the defendant had notice the State intended to prove serious physical injury, the defendant did not suggest the amendment affected his trial strategy, he requested no continuance or recess at the time of the amendment and his defense – that someone else assaulted the

[2] Rule 13.5(b) states, "The charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment. The charging document shall be deemed amended to conform to the evidence adduced at any court proceeding." Ariz. R. Crim. P. 13.5(b).

victim – did not change as a result of the amendment. *Id.* at 114-51, ¶¶ 27-28, 219 P.3d at 1043-44.

B. Alleged Violation of Rule 13.5(b).

¶7 Quilcat argues we should reverse his conviction because the amendment was prejudicial per se, citing *State v. Sanders*, 205 Ariz. 208, 68 P.3d 434 (App. 2003). But the court in *Freeney* expressly disapproved our conclusion in *Sanders* that such an error was prejudicial per se. 223 Ariz. at 114, ¶ 26, 219 P.3d at 1043. Therefore, even if the amendment to the indictment in this case violated Rule 13.5(b), we will not reverse if the error was harmless. *Id.*

¶8 Under harmless error review, we will affirm the conviction in spite of the error "if the state, 'in light of all of the evidence,' can establish beyond a reasonable doubt that the error did not contribute to or affect the verdict." *State v. Valverde*, 220 Ariz. 582, 585, ¶ 11, 208 P.3d 233, 236 (2009) (quoting *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993)). "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.* (quoting *State v. Anthony*, 218 Ariz. 439, 446 ¶ 39, 189 P.3d 366, 373 (2008)). Here, assuming without deciding the amendment

violated Rule 13.5(b), we conclude the State met its burden of showing any error was harmless beyond a reasonable doubt.

¶9 Quilcat contends the amendment prejudiced him because, unlike the defendant in *Freeney*, he had no notice prior to the amendment that the State intended to prove sexual intercourse by masturbatory contact. To the contrary, the record demonstrates Quilcat did have notice the State intended to prove he engaged in masturbatory contact in violation of A.R.S. §§ 13-1406(A) and –1401(3). As we noted in our memorandum decision, 2009 WL 2136873, at *2, ¶ 9, at a bail hearing nine months before the trial, the State presented the court with transcripts from Quilcat's two interviews with a detective and a videotape from the night of the incident. The court stated in its minute entry that in the interviews "the defendant admits at least indirectly manipulating her vaginal area" and that "the videotape shows his hand reaching under her skirt and moving back and forth."

¶10 As the superior court pointed out, the amendment conformed to Quilcat's version of the events, as related to a police detective during his two interviews. When intereviewed, Quilcat told a detective he touched the victim "on her vaginal area over the underwear" but engaged in no penetration. He also admitted to manipulating the victim's vaginal area. Given Quilcat's statements to the detective and the State's use of the transcripts and the video at the bail hearing nine months before

trial, we conclude Quilcat had adequate notice the State intended to or could attempt to prove sexual intercourse by way of masturbatory contact, in addition to or instead of by digital penetration.

¶11 Additionally, despite Quilcat's conclusory assertions to the contrary, the record shows the amendment did not prejudice his defense. Quilcat's entire defense consisted of arguing the victim consented, that it was not possible on the videotape to see what his hand was doing, that he had no contact with the victim's vaginal area and that the police manipulated or misinterpreted his statements. For example, in his opening statement Quilcat's counsel told the jury:

> [T]he video shows the . . . alleged sexual assault . . . . And there's a point where [Quilcat] moves his hand, and you can see his hand moving, and he goes down to the groin area, and he goes down to the thigh area of [the victim]. And then that's all you really can see. The video is really [Quilcat's] best proof that he . . . did not do a sexual assault. . . . There is no sexual assault on the video, because you can't even see his hand.

Counsel also noted that Quilcat's statements to police indicated "that he might have touched around the thigh area, or maybe on the outside of her underwear, but he did not touch her vagina, and he certainly did not penetrate her vagina with his fingers." Thus, counsel's opening statements suggested that Quilcat engaged in neither masturbatory contact nor digital penetration.

¶12 Quilcat's cross-examinations of the State's witnesses also supported a defense to both definitions of sexual intercourse. Rather than focus on digital penetration, defense counsel more broadly asked witnesses whether they saw Quilcat do "anything of a sexual nature" to the victim or touch her in any way that was "sexual," other than kissing her. Each witness responded negatively. Also, when cross-examining the detective who interviewed Quilcat, defense counsel went beyond eliciting testimony that Quilcat never admitted to digital penetration. He also questioned the detective as to whether it was he or Quilcat who originally used the word "manipulation," suggesting that the detective either misinterpreted Quilcat's responses or misled him into agreeing that he had manipulated the victim's vaginal area.

¶13 Counsel's opening statement and cross-examinations of witnesses, all of which occurred before the amendment, show that Quilcat's defense was not simply that he did not digitally penetrate the victim, but that he did not engage in any manner of sexual intercourse with her within the meaning of the statute. *See Freeney*, 223 Ariz. at 115, ¶ 28, 219 P.3d at 1044 (defendant's "'all or nothing' defense, based on his assertion that someone other than he was the perpetrator, did not change as a result of the amended charge"); *see also State v. Ramsey*, 211 Ariz. 529, 533, ¶ 7, 124 P.3d 756, 760 (App. 2005); *cf.*

State v. Marshall, 197 Ariz. 496, 506, ¶ 39, 4 P.3d 1039, 1049 (App. 2000) ("Of course, one cannot penetrate the vagina without also contacting or penetrating the vulva."). Although Quilcat asserts the amendment prejudiced his defense, we do not discern any prejudice, nor does Quilcat suggest how his defense would have been different if the amendment had been made prior to trial. On this record, therefore, we conclude that even if the amendment violated Rule 13.5(b), the error was harmless beyond a reasonable doubt.

C. Alleged Sixth Amendment Violation.

¶14 Quilcat also argues the amendment to the indictment violated the Sixth Amendment's notice requirement. A criminal defendant has "a fundamental right to be clearly informed of the nature and cause of the charges against him" to permit the adequate preparation of a defense. *Calderon v. Prunty*, 59 F.3d 1005, 1009 (9th Cir. 1995); *see also State v. Moore*, 222 Ariz. 1, 12, ¶ 51, 213 P.3d 150, 161 (2009). This requirement is met when the defendant has actual notice of the charge, whether from the indictment or from other sources. *Freeney*, 223 Ariz. at 115, ¶ 29, 219 P.3d at 1044.

¶15 For the same reasons we conclude any error in the amendment was harmless beyond a reasonable doubt, we also conclude the amendment did not violate Quilcat's Sixth Amendment rights. Although the "to wit" language of the indictment

referenced "digital penetration" and did not mention "masturbatory contact," Quilcat had notice the State sought to prove such contact from his own statements to the detective and the State's submission of the transcripts of those interviews at a pretrial hearing. Because any error in the amendment was harmless, he was not prejudiced and his Sixth Amendment right to adequate notice was satisfied.

CONCLUSION

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

/s/_____
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/_____
PETER B. SWANN, Presiding Judge

/s/_____
JOHN C. GEMMILL, Judge