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,	1 CA-CR 08-0774
Appellee,	DEPARTMENT C
v.	**MEMORANDUM DECISION**
BRANDEN JOB WILSEY,	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
Appellant.	

Appeal from the Superior Court in Mohave County

Cause No. CR-2007-1368

The Honorable Steven F. Conn, Judge

REVERSED AND REMANDED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

Mohave County Appellate Defender — Kingman
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Attorney for Appellant

I R V I N E, Presiding Judge

¶1 Branden Job Wilsey ("Wilsey") appeals his conviction and sentence for aggravated assault, a class six felony. Wilsey argues that his conviction must be reversed because it was based upon both a duplicitous indictment and a duplicitous charge, which deprived him of the right to a unanimous verdict. Because we conclude the trial court erred in failing to submit special verdicts or otherwise instruct the jury in a matter that would ensure a unanimous verdict, we reverse and remand.

I. FACTS AND PROCEDURAL HISTORY

A. The Indictment

¶2 Wilsey was indicted on two counts of aggravated assault stemming from an encounter with a police officer after being stopped for a traffic violation. Count 1 alleged Wilsey committed assault "knowing or having reason to know that the victim was a peace officer," in violation of Arizona Revised Statutes ("A.R.S.") section 13-1204(A)(8)(a) (2010).[1] Count 2 alleged Wilsey "knowingly [took] or attempt[ed] to exercise control over any implement that is being used by a peace officer," in violation of A.R.S. § 13-1204(A)(9)(c). Both counts cited to A.R.S. § 13-1203 (2010), which sets forth the three forms of criminal assault, but neither count specified in the text or by citation the particular form of criminal assault the

[1] We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

State was charging as the predicate offense for the aggravated assault charges.

B. The Testimony

¶3 The circumstances leading up to the alleged assaults are undisputed: A police officer stopped Wilsey's vehicle for a minor traffic violation. Wilsey lied to the officer about his identity because he believed he had an outstanding warrant for an unpaid ticket. When the officer realized Wilsey was lying to him, he directed Wilsey to place his hands on the patrol car. Despite further questioning by the officer, Wilsey continued to provide false information about his name and date of birth. The officer decided to detain Wilsey and grabbed his left wrist.

¶4 The testimony of the officer and Wilsey diverge at this point: The officer testified that as he reached for Wilsey's other hand, Wilsey spun around and punched him in the right shoulder, knocking him back about five feet. In his testimony, Wilsey admitted that he instinctively turned around to pull away from the officer's grasp because the officer was hurting him, but denied hitting the officer. The officer further testified that he drew his Taser while trying to regain his balance and attempted to fire it as Wilsey lunged at him; however, Wilsey was able to disable the Taser by dislodging the front firing cartridge with his right hand. Wilsey denied swinging or lunging at the officer. He did acknowledge swatting

at the Taser, but stated he did so because he believed it was a gun and was in fear of getting shot. After the Taser failed to fire, Wilsey ran from the officer, but was apprehended after a short foot chase.

C. The Jury Instructions and Verdicts

¶5 During the settlement of jury instructions, defense counsel requested that special forms of verdict be given to the jury to permit the jury to indicate which type of assault they found under A.R.S. § 13-1203 to avoid the potential for non-unanimous verdicts with respect to the underlying predicate assault charges for the two aggravated assault counts. The trial court refused this request. The trial court did, however, distinguish between the two counts by adding the parenthetical "(on a peace officer)" on the verdict forms for Count 1 and "(by trying to control a peace officer's implement)" on the verdict forms for Count 2.

¶6 The trial court instructed the jury as follows on the two counts of aggravated assault:

> The Defendant is charged with 2 separate counts of Aggravated Assault. To distinguish them in the instructions and in the verdict forms, they will be referred to as Aggravated Assault (on a peace officer) and Aggravated Assault (by trying to control a peace officer's implement).
>
> The crime of Aggravated Assault (on a peace officer) has 2 elements. In order to find the defendant guilty of Aggravated

Assault (on a peace officer), you must find that:

1. The Defendant committed an assault by EITHER:

   A. Intentionally placing another person in reasonable apprehension of imminent physical injury; OR

   B. Intentionally, knowingly or recklessly causing a physical injury to another person; OR

   C. Knowingly touching another person with the intent to injure, insult, or provoke such person; AND

2. The Defendant knew or had reason to know that the other person was a peace officer engaged in the execution of any official duties.

The crime of Aggravated Assault (by trying to control a peace officer's implement) has 4 elements. In order to find the Defendant guilty of Aggravated Assault (by trying to control a peace officer's implement), you must find that:

1. The Defendant committed an assault by EITHER:

   A. Intentionally placing another person in reasonable apprehension of imminent physical injury; OR

   B. Intentionally, knowingly or recklessly causing a physical injury to another person; OR

   C. Knowingly touching another person with the intent to injure, insult, or provoke such person; AND

2. The Defendant took or attempted to exercise control over any implement

that a peace officer was using or attempting to use; AND

3. The Defendant did so knowingly; AND

4. The Defendant knew or had reason to know that the other person was a peace officer engaged in the execution of any official duties.

¶7 The parties agreed that Count 1, Aggravated Assault (on a peace officer), pertained to the testimony that Wilsey punched the officer and that Count 2, Aggravated Assault (by trying to control a peace officer's implement), pertained to the testimony that Wilsey interfered with the officer's attempt to use his Taser. Counsel for the State and Wilsey made closing arguments consistent with this understanding of the two charges. The jury returned verdicts of not guilty on Count 1 and guilty on Count 2.

II. DISCUSSION

¶8 A defendant has the right to a unanimous jury verdict in a criminal case. Ariz. Const. art. 2, § 23. To this end, "Arizona law requires that each separate offense be charged in a separate count, [and] an indictment which charges more than one crime within a single count may be dismissed as duplicitous." *State v. Schroeder*, 167 Ariz. 47, 51, 804 P.2d 776, 780 (App. 1990); *see also* Ariz.R.Crim.P. 13.3(a) (permitting joinder of offenses, "[p]rovided that each is stated in a separate count"). "Duplicitous indictments are prohibited because they fail to

give adequate notice of the charge to be defended, they present a hazard of a non-unanimous jury verdict, and they make a precise pleading of prior jeopardy impossible in the event of a later prosecution." *State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989). A violation of the right to a unanimous verdict constitutes fundamental error. *State v. Davis*, 206 Ariz. 377, 390, ¶ 64, 79 P.3d 64, 77 (2003). We review de novo whether Wilsey's constitutional right to a unanimous verdict was violated. *See State v. Beasley*, 205 Ariz. 334, 336, ¶ 9, 70 P.3d 463, 465 (App. 2003).

¶9 Wilsey contends he was deprived of a unanimous verdict because it cannot be determined whether all the jurors agreed on the same type of assault committed by him with respect to his conviction on Count 2. The State responds that assault is a single offense that can be committed in three different ways, citing *State v. Rineer*, 131 Ariz. 147, 639 P.2d 337 (App. 1981). Consequently, the State reasons, Wilsey was not entitled to have the jury agree upon a single means of the commission of the offense. The flaw in the State's argument is that the portion of *Rineer* relied on by the State as support for its position regarding the unitary nature of the offense of assault does not survive the Arizona Supreme Court's recent decision in *State v. Freeney*, 223 Ariz. 110, 219 P.3d 1039 (2009).

¶10 Pursuant to A.R.S. § 13-1204(A) (2010): "A person commits aggravated assault if the person commits assault as prescribed by § 13-1203" under the various circumstances listed in the statute. In other words, to prove a charge of aggravated assault, the State is required to establish both the commission of assault under A.R.S. § 13-1203 and one of the particular circumstances specified in A.R.S. § 13-1204 that renders the assault "aggravated" in nature.

¶11 Arizona Revised Statutes § 13-1203(A), in turn, states:

> A. A person commits assault by:
>
> 1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
>
> 2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or
>
> 3. Knowingly touching another person with the intent to injure, insult or provoke such person.

This statute describes three ways one can commit the offense of assault. Reduced to their most basic level, the first form of assault consists of causing physical injury, the second consists of causing reasonable apprehension, and the third consists of touching with certain intent.

¶12 In *Rineer*, a panel of this court construed these three forms of assault as a single offense in addressing whether the offense of threatening and intimidating is a lesser-included offense of aggravated assault:

> Appellant's argument also assumes that an assault described in § 13-1203(A)(2) is an offense distinct from those described in the other two clauses of that subsection. That is not the case. The statute does not create three separate offenses; it merely enumerates three ways the single offense of assault can be committed. If the legislature, instead of using enumerated clauses, had defined assault in a cumbersome uninterrupted sentence, there would be no doubt that one could commit assault, and therefore aggravated assault, without committing threatening or intimidating. The simple use of enumeration to make the statute more readable should not lead to a contrary conclusion.

131 Ariz. at 149, 639 P.2d at 339.

¶13 It has long been the law in Arizona that "[a]lthough a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed." *State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982) (citation omitted). Thus, for example, because first degree murder is only one crime, the jury need not unanimously agree on whether the defendant committed premeditated murder and felony murder. *Id.* The same is true of the offense of kidnapping. Even though A.R.S. § 13-1304(A)

(2010) defines kidnapping as knowingly restraining a person with any of six enumerated goals, because kidnapping is considered one offense, the jury need not unanimously agree on the intended goal. *State v. Herrera*, 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993). Accordingly, if *Rineer* is correct in construing A.R.S. § 13-1203(A) as defining assault as a unitary offense that can simply be committed in three different ways, even if the jurors did not unanimously agree on which form of assault was committed by Wilsey, there would be no denial of the right to a unanimous verdict because they all would have agreed that he committed the offense of "assault" in one form or another.

¶14 In *Freeney*, however, our supreme court examined the assault statute in connection with a challenge to an amendment of an aggravated assault charge and held that amending the charge to change the underlying A.R.S. § 13-1203 assault from subsection (A)(2) (reasonable apprehension) to (A)(1) (causing physical injury) altered the charge to an entirely different and separate offense. The court stated:

> When the elements of one offense materially differ from those of another-even if the two are defined in subsections of the same statute-they are distinct and separate crimes. *E.g., State v. Leenhouts*, 218 Ariz. 346, 349 ¶ 13, 185 P.3d 132, 135 (2008) ("Because the elements required to prove a violation of subsection A.1 of A.R.S. § 13-1302 differ from those required to prove a violation of subsection A.3, the original and supervening indictments do not allege

> the same charge.") (internal brackets omitted); *State v. Sustaita*, 119 Ariz. 583, 591, 583 P.2d 239, 247 (1978) ("We have stated that 'an offense which requires different evidence or elements than the principal charge is a separate offense . . . .'") (quoting *State v. Woody*, 108 Ariz. 284, 287, 496 P.2d 584, 587 (1972) (internal brackets omitted)).
>
> Here, the elements required to prove a violation of § 13-1203(A)(2) differ from those required to prove a violation of § 13-1203(A)(1). Because the amended indictment altered the elements of the charged offense, it constituted a change in the nature of the offense.

Freeney, 223 Ariz. at 113, ¶¶ 16-17, 219 P.3d at 1042; *accord, State v. Sanders*, 205 Ariz. 208, 216, ¶ 33, 68 P.3d 434, 442 (App. 2003) (stating that the "two types of assault ['knowing touching' under subsection (A)(2) and 'reasonable apprehension' under (A)(3) of § 12-1203] are in fact distinctly different crimes"). Thus, although *Rineer* was not expressly overruled by *Freeney*, it is clear that its construction of A.R.S. § 13-1203 as a unitary offense can no longer be considered good law. In sum, contrary to the State's contention, assault as defined in A.R.S. § 13-1203(A) is not one crime, but three separate offenses.

¶15 The indictment in the instant case was not duplicitous on its face as it did not allege more that one offense in each count. Instead, by not specifying the nature of the underlying assault for the aggravated assault charges, the two counts were

merely vague or indefinite. As such, the indictment could have been challenged through a motion for a more definite statement. *See* Ariz.R.Crim.P. 13.2(a) ("The indictment or information shall be a plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged."). Nevertheless, because Wilsey failed to raise this issue by motion in accordance with Rule 16 prior to trial, he has waived any claim for relief based on the defect in the indictment. *See State v. Puryear*, 121 Ariz. 359, 362, 590 P.2d 475, 478 (App. 1979).

¶16 Although not duplicitous on its face, as a result of the indefinite indictment, the trial court charged the jury in a duplicitous manner on the aggravated assault counts. Rather than have the State elect a particular form of assault as the underlying predicate offense for the aggravated assault charges, the trial court instructed on all three forms of assault under A.R.S. § 13-1203. Therefore, the jury had three different assault offenses placed before them for their consideration on each count, thereby creating a risk of non-unanimous verdicts.

¶17 Even with duplicitous charges being submitted to the jury, the risk of non-unanimous verdicts could have been avoided by use of special verdicts as Wilsey requested. Indeed, use of special verdicts is specifically recommended by the Revised Arizona Jury Instructions when instructing on assault offenses

for just this purpose. *See* Rev. Ariz. Jury Instr. (Statutory Criminal) 12.03 (3d ed. 2008). In the alternative, the jurors could have been instructed that they could only return a verdict of guilty if they all unanimously agreed on the particular form of assault committed by Wilsey. *State v. Kelly*, 149 Ariz. 115, 117, 716 P.2d 1052, 1054 (App. 1986). Absent such measures to eliminate the risk of a non-unanimous verdict, the submission of duplicitous charges to the jury was error. *Id.; see also State v. Davis*, 206 Ariz. 377, 390, ¶ 61, 79 P.3d 64, 77 (2003) (holding that "the resulting risk that the jury returned a non-unanimous verdict constituted error").

¶18 Not every duplicitous charge will result in reversible error. In *Kelly*, the court held that a charge of aggravated assault was duplicitous when the indictment alleged both assault with a rifle and causing physical injury. 149 Ariz. at 116-17, 716 P.2d at 1053-54. The conviction was nevertheless affirmed on the grounds that no prejudice resulted to the defendant given that the evidence was undisputed that the defendant assaulted the victim in both ways. *Id.* at 117, 716 P.2d at 1054. In contrast, the evidence in the present case does not permit the conclusion that the duplicitous charge on Count 2 was harmless.[2] The jury could find from the officer's testimony that Wilsey

[2] The duplicitous charge on Count 1 was harmless error as Wilsey was acquitted on this count.

assaulted him either by intentionally placing him in reasonable fear of imminent physical injury in violation of A.R.S. § 13-1203(A)(2) or by touching him with intent to injure, insult, or provoke in violation of A.R.S. § 13-1203(A)(3).[3] The evidence, however, would also support a finding that the State failed to prove all the elements for these two forms of assault in light of Wilsey's testimony that his actions were not done with the requisite intent to commit either offense. Thus, it is possible that the jury reached the verdict of guilty on this count with some jurors finding Wilsey committed one form of assault and the others finding he committed another. Because we are unable to determine beyond a reasonable doubt that the jury was unanimous on the form of assault committed, the conviction on Count 2 must be vacated.

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[3] The possibility of a conviction for assault in violation of A.R.S. § 13-1203(A)(1) does not exist as there was no evidence the officer was injured in the encounter with Wilsey.

III. CONCLUSION

¶19 For the foregoing reasons, the judgment of conviction and sentence are vacated and this matter is remanded for further proceedings consistent with this decision.

/s/

PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

DONN KESSLER, Judge